Vitek Electronics, Inc. *and* International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC. Case 22-CA-9695

12 January 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 30 June 1982 Administrative Law Judge Howard Edelman issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The Union filed cross-exceptions, a supporting brief, and a brief in opposition to Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommendation that the Board's Order be reaffirmed.[4]

ORDER

The Order issued by the Board in *Vitek Electronics*, 249 NLRB 885 (1980), is reaffirmed.

[1] The Respondent has filed a motion to amend its Exh. 118 to introduce further evidence of employee turnover in the bargaining unit. In addition, the Respondent's exceptions renew motions, previously denied by the administrative law judge, to reopen the record in Case 22-RC-7833 for the introduction of evidence before a hearing officer. We hereby deny these motions as lacking in merit, for reasons set forth in the judge's decision. In addition, we deny the Respondent's request for oral argument on the question whether the law of *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), should be retroactively applied in this case. Because we affirm the judge's finding that the Union did not make any objectionable campaign misrepresentations under the law of *General Knit of California*, 239 NLRB 619 (1978), which was overruled by *Midland National*, we find no need to decide the applicability of the more lenient standard in the later case.

Member Hunter, in adopting the judge's conclusion that the alleged misrepresentations do not warrant setting aside the election, applies *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), as the law of the case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In response to exceptions from both the Respondent and the Union, we correct the judge's misidentification of the Union's employee observer at the hearing. Mary Sheffield was the observer.

[3] In affirming the judge's findings and conclusions, we disavow any reliance on: (1) his statements that certain conduct by the Respondent could arguably have violated Sec. 8(a)(1) of the Act; (2) his view that witness Reilly's comparative wage analysis was flawed by the assumption that cost-of-living provisions in union contracts were retrospective "catch-up" clauses rather than prospective defenses against inflation; (3) the implication that the Respondent needed to prove that its wages were among the area's highest in order to meet its burden of proof for the wage misrepresentation alleged in Objection 4; and (4) his comments about the "frivolous" nature of the Respondent's objections.

Member Hunter and Member Dennis adopt the judge's recommendations that Respondent's Objections 3, 5, 7, and 8, involving alleged threats, intimidation, and harassment of employees and alleged appeals to racial prejudice, be overruled. In so doing, they find that even assuming arguendo that the employees who engaged in such conduct were agents of the Union, such conduct would not warrant setting aside the election in the totality of the circumstances here.

[4] We deny the Union's request for extraordinary remedial provisions in the Order because we find such remedies inappropriate in this test-of-certification proceeding where the Respondent has raised debatable issues and a conventional bargaining order will suffice to remedy the Respondent's refusal to bargain.

Because the bargaining order in this case is based on the Union's certification, and in the absence of extraordinary circumstances here, Member Hunter and Member Dennis find it unnecessary to pass on the judge's discussion concerning the relevance of employee turnover and passage of time as factors in determining whether a remedial bargaining order is appropriate.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge: On June 7, 1979, a majority of the employees of Vitek Electronics, Inc., herein called Respondent, in a secret-ballot election conducted under the supervision of the Regional Director for Region 22, designated by a vote of 70 to 45, International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC, herein called the Union, as their representative for the purpose of collective bargaining with Respondent. Thereafter, Respondent filed timely objections to the conduct of the election. On September 7, 1979, the Acting Regional Director for Region 22 recommended the Employer's objections be overruled in their entirety and that pursuant to Section 9(a) of the National Labor Relations Act the Board issue a Certification of Representative. On December 14, 1979, the Union was certified as the collective-bargaining representative of Respondent's production and maintenance employees. Thereafter, Respondent upon an appropriate demand by the Union refused to recognize the Union as said collective-bargaining representative. On January 11, 1980, the Union filed unfair labor practice charges with Region 22, alleging a refusal to bargain by Respondent in violation of Section 8(a)(1) and (5) of the Act. On February 4, 1980, a complaint was issued against Respondent alleging that Respondent had engaged in unfair labor practices by refusing to bargain with the Union within the meaning of Section 8(a)(1) and (5) of the Act. On May 28, 1980, the Board issued a Decision and Order in 249 NLRB 885, finding that Respondent had violated Section 8(a)(1) and (5) of the Act by refusing since on or about January 7, 1980, and at all times thereafter to bargain collectively with the Union as the exclusive collective-bargaining representative of Respondent's production and maintenance employees. Thereafter, Respondent petitioned to the United States Court of Appeals for the Third Circuit for review and the National Labor Relations Board filed a cross application for enforcement of its Decision and Order (Case No. 80-1867). On June 30, 1981, the United States Court of Appeals for the Third Circuit entered its Decision, denying enforcement of the

Board's Order, and remanding the case to the Board for a hearing on Respondent's Objections 3–8, to the conduct of the aforementioned election. Thereafter, by orders dated October 15 and 21, 1981, the Board ordered that a hearing be held before an administrative law judge "for the purpose of taking evidence on Respondent's objections in accordance with the Court's remand and this direction" and that, upon the conclusion of such hearing, "the Administrative Law Judge shall prepare and serve on parties a decision containing findings of fact upon the evidence received, conclusions of law, and recommendations."

Pursuant to the above orders, a hearing was held before me in Newark, New Jersey, on January 6–8, 12–15, 20–22, and 26–29, and February 2–5, were 3,995 pages. All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.[1]

Upon the entire record[2] in this supplemental hearing, and from my observation of the witnesses, and having fully considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *The Scope of the Court Remand*

Respondent filed the following objections to the conduct of the election which were remanded for a hearing herein:[3]

3. OBJECTION NO. 3[4]

> The International Union of Electrical, Radio and Machine Workers, AFL–CIO, its officers, agents and employees (collectively the "Union," the "IUE" or the "Petitioner") engaged in a campaign of fear, intimidation, coercion and threats directed at the Vitek employees during the election campaign, appealed to the employees' race and other irrelevant factors and otherwise created an atmosphere at the plant so that the employees were unable to express their uncoerced desires in the election.
>
> (a) During the Union campaign at Vitek, "Harold," believed to be an agent and representative of the IUE, stopped a Vitek employee in the Vitek parking lot. "Harold" called the employee "one of those house niggers." Both "Harold" and the employee are black.
>
> (b) An employee wrote a letter to "Harold" in which the employee indicated his opposition to the Union. The next day, another employee, whom the first employee knew to be in favor of the Union, threatened the first employee that if the Union won it would do nothing to help him if he had a problem with Vitek and that "could get in a lot of trouble with the Union." The first employee believed that if the Union won the election they would try to get rid of him and he would lose his job.
>
> (c) Various employees were threatened that they would be "given a hard time" if they were not for the Union and otherwise "felt afraid" because they would not indicate their unequivocal support of the Union during the campaign.

4. OBJECTION NO. 4

On the day of the election itself, and possibly on June 6, 1979, the day prior to the election, the Union distributed to employees, by hand and possibly by mail to their homes, a handbill attached hereto as "Exhibit 1" containing misrepresentations of material facts particularly within the knowledge of the Union at a time when the Employer lacked an adequate opportunity to respond. Examples of misstatements from this handbill, which is objected to *in toto*, include:

> In the "good ole" days, before the Union came on the scene, the Company had every opportunity to make Vitek a decent place to work.
>
> But they goofed.
>
> Rates of pay were the lowest in the area. Seniority meant nothing when it came to promotions or overtime.
>
> Few safety precautions were taken to protect the people from carbon monoxide fumes, and when they got sick because of the fumes, many of the workers lost pay.
>
> Employees could be fired with no chance of appeal and all in all, management was completely in the drivers seat.

These statements are completely false and misleading. For example, Vitek's rates of pay are among the highest in the area for similar work. Moreover, the statements were made at a time—at most, one day before the election, and perhaps on the day of the election itself—when Vitek obviously did not have an adequate opportunity to obtain the necessary information and to prepare and distribute an appropriate response to these material misrepresentations.

5. OBJECTION NO. 5

On the day of the election itself, and possibly on June 6, 1979, the Union distributed to employees, by hand and possibly by mail to their homes, a handbill attached hereto as "Exhibit 2" containing misrepresentations of material facts particularly within the knowledge of the Union at a time when the Employer lacked an adequate opportunity to respond. Examples of misstatements from this handbill, which is objected to *in toto*, include:

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[1] The General Counsel, Respondent, and the Union each filed a brief.

[2] Errors in the transcript are hereby noted and corrected.

[3] Respondent did not seek review of objectional conduct alleged in its Objections 1 and 2, which involved alleged misconduct during the election held on June 7, 1982.

[4] Applicable exhibits filed in connection with Respondent's objections were introduced separately by Respondent during the course of this hearing.

"As a black man myself, I have learned the hard way that nothing is handed to anyone on a silver platter and that we are conditioned from childhood to struggle to get to first base."

. . . . .

"As a result of the efforts of unions like the IUE-AFL-CIO, we have been able to join together, shoulder to shoulder, and make our gains together in the face of attempts by companies to keep us apart and thereby keep us all down."

"This has also been the case at Vitek. Workers have been separated into different shifts and on to different types of jobs in order to keep us apart so that the company would have the advantage over all of us."

These statements clearly were designed to create an atmosphere of fear, divisiveness and racial tension among Vitek employees. The references in the above letter to Mr. Morrison's race was particularly intended by the Union to emphasize the fact that Vitek employees are of many racial and ethnic origins, and thus to create an atmosphere of hostility and suspicion among the employees which the Union exploited to its own advantage.

"Exhibit 2" also stated, in part:

"Ever since IUE came on the scene, it is obvious to all that the company has been 'born again' and in order to defeat the union is offering all sorts of tidbits for the time being, such as basketball, softball, free drinks, disco, etc."

"From my personal observation, the company cannot win the vote of Vitek workers through these obvious handouts."

The plain implication of these assertions—that Vitek tried to win the election by offering temporary "handouts" to its employees—is patently false and implies that the employees will lose benefits by voting for the company (see, also, Objection No. 7).

6. OBJECTION NO. 6

On the day of the election itself and possibly on June 6, 1979 the Union distributed to employees, by hand and possibly by mail to their homes, a handbill attached hereto as "Exhibit 3" containing misrepresentations of material facts particularly within the knowledge of the Union at a time when the Employer lacked an adequate opportunity to respond. Examples of misstatements from this handbill, which is objected to *in toto*, include:

"The cost of living is going up at a rate of 14%."

"In other plants in this area, where the people have previously voted in the IUE, the Union has negotiated cost of living protective clauses.

"Under their union contract

* AT EDISON PRODUCTS (WHITE-WESTINGHOUSE), EDISON, N.J.

* AT GULTON INDUSTRIES, METUCHEN, N.J.

* AT DELCO BATTERY, NEW BRUNSWICK, N.J.

the wages of IUE members are increased regularly, throughout the year, to keep pace with the cost of living increase announced by the U.S. Department of Labor.

This is the kind of protection we need at Vitek where wages are low enough without being further 'cut' by runaway prices."

Upon information and belief, the collective bargaining agreements at Edison Products, Gulton Industries and Delco Battery do not guarantee to employees absolute and unlimited protection against cost of living increases, as stated in the Union leaflet. Rather those cost of living formulas are "capped" and keyed to a specific formula. Again, these material misrepresentations were made at a time when Vitek obviously did not have an adequate opportunity to obtain the necessary information and to prepare and distribute an appropriate response to these misrepresentations.

7. OBJECTION NO. 7

In letters distributed to the employees throughout the campaign, many at the "last minute" so that the Employer lacked a sufficient opportunity to respond, the Union stated or intimated that employees would lose benefits or suffer other detrimental consequences if the Union lost the election. Examples of these threats include statements and intimations that benefits will be "take[n] away" [Exhibits 1, 2, 4 and 5] if the Union loses the election. Again, Exhibits 4 and 5 are objected to *in toto.*

8. OBJECTION NO. 8

The Union, its officers, agents and employees in other respects intimidated and threatened unit employees and engaged in other conduct coercing Vitek employees in the unit into voting for the Union and thereby prevented a free and uncoerced vote on the part of the employees in the unit concerned.

B. *Background*

In 1976, Respondent employed a handful of employees and was engaged in the exclusive production of an electronic filter trap used in the cable TV industry. From 1976 through the latter part of January 1979, Respondent's single facility was located in Middlesex, New Jersey. In the latter part of January 1979, Respondent moved to its present location of Edison, New Jersey. The Edison, New Jersey facility was a new custom built facility, constructed by Respondent through a building contractor. As of June 1979, Respondent employed a total of 127 unit employees. Of this total, 35 employees were male and 88 employees were female. Respondent's employee complement was a highly integrated racial

complement comprising 54 black employees, 33 white employees, 15 Hispanic employees, and 11 Asian employees. Election notices were printed in English, Spanish, Hindu, and Korean.

The unit covered by the certification was essentially a production and maintenance unit.[5] The unit employees were invariably unskilled who received anywhere from 2 days to 2 weeks on-the-job training, which enabled them to become skilled enough to perform the job required.[6]

C. *The Union's Organizing Campaign—Respondent's Antiunion Campaign*

The union campaign in connection with organizing Respondent's employees commenced sometime around mid-March 1979,[7] when Respondent employees contacted the Union and expressed interest. International union representative Harold Morrison was placed in charge of the Union's campaign. Assigned initially to work with Morrison was International representative Louis Rivera. Beginning in May, International representatives Theodore Kenney, Tom Deary, and Lenni-Ann Rebor were assigned to assist Morrison in the Union's campaign. Morrison is black, Rivera is Hispanic, and Kenney, Deary, and Rebor are white.

Shortly after the employees contacted the Union, Morrison held several meetings with Respondent's employees. According to Morrison's credible and uncontradicted testimony, attendance at the first two meetings was approximately 90 percent of Respondent's total employee complement, of which, in Morrison's estimation, 80 percent were strongly prounion. During these meetings, a large number of signed union authorization cards were obtained. On April 5 a petition for an election was filed with Region 22. During the entire union campaign, the Union held approximately 10 to 15 meetings outside the plant. Meetings were often held in a nearby Holiday Inn or similar private locations. Beginning on April 3 and continuing at regular intervals until June 6, the Union distributed to the employees 16 separate campaign leaflets.[8]

Initially, Morrison and Rivera were present at Respondent's facility 2 to 3 days a week. They were later joined in May by Kenney, Deary, and Rebor. During these plant visits, the union representatives would speak with employees concerning plant problems, listen to complaints or reports by various employees concerning Respondent's antiunion campaign, and distribute union leaflets. Of the 16 leaflets distributed to the employees, 15 of these leaflets were distributed by Morrison and other International union representatives to employees as they came to and left work. The 16th leaflet was mailed to all employees on or about June 5.[9] Generally the union representatives stationed themselves on the public street in front of Respondent's facility and adjacent to Respondent's parking lot. All union leaflets were distributed to at least the majority of Respondent's employees. All leaflets (with one exception not relevant in connection with the disposition of this case) were distributed in English only.

Robert Giessler, Respondent president, first became aware of the union campaign sometime during late March 1979, when one of his supervisors brought him a union authorization card and told him that the employees were being solicited by this Union to sign these cards. Thereafter, Respondent commenced an admittedly extensive antiunion campaign. This campaign included many speeches to assembled employees delivered by Giessler and various other Respondent officials. Respondent conducted approximately one such meeting each week during the campaign including a speech to all shifts delivered by Giessler 24 hours prior to the election. Additionally Respondent issued 20 antiunion leaflets throughout the course of the union campaign to its employees. Further, during the course of the Union's campaign, Respondent initiated major employee benefits which included a 17-percent wage increase, life insurance, dental coverage, major medical coverage, and additional vacation and holidays.[10]

D. *Agency Allegations*

Respondent contends that employees Elestine Randolf, Mary Sheffield, Fanny Taylor, Rudy Newsome, Dorothy Kmiec, Shelly Woodly, Florence Davis, Dorothy Owens, and Ellen Garza were agents of the Union. Respondent further noted that all of the above employees with the exception of Kmiec and Garza were black.

Harold Morrison credibly testified without contradiction that during the union organizing campaign no union committees were formed. According to Morrison's credible testimony, in view of the 90-percent turnout of employees at the initial union meetings and the overwhelming support of employees for the Union, it was determined by Morrison that there was no need to form internal working union committees. Morrison testified that the "IUE-Vitek Organizing Committee," which is set forth on some of the Union's campaign literature, was

[5] The unit set forth in the complaint herein consists of:
All full time and regular part time production and maintenance employees, including punchers, respoolers, crimpers, connectors, cutters, soderers, benders, tiers technicians, testers, braiders, driver, janitor, group leaders, material handlers, and shipping and receiving employees employed by Respondent at the Edison plant, but excluding all other employees, including superintendents, floor persons, production control persons, office manager, payroll clerk, purchasing agent, sales employees, marketing employees, personnel administrator, chief engineer, office clerical employees, managers, professional employees, temporary employees, guards and supervisors as defined in the Act.

[6] Respondent also employed two unit technicians who had high school degrees and who required about 1 year experience in the field or on-the-job training.

[7] Unless otherwise noted, all dates referred to herein are in 1979.

[8] Many of the union leaflets and Respondent's leaflets will be discussed in detail below.

[9] This leaflet is the subject of Respondent's Objection 5 and is discussed herein below.

[10] As a result of the granting of such benefits, and other conduct described below, the Union filed unfair labor practice charges against Respondent alleging violations of Sec. 8(a)(1), (3), and (5) of the Act. The Region ultimately determined that a complaint should issue alleging that the granting of these benefits and other conduct alleged constituted violations of Sec. 8(a)(1), (3), and (5) of the Act. The complaint also alleged that a bargaining order was appropriate in view of the alleged unfair labor practices. However, the parties thereafter entered into a informal settlement agreement containing a nonadmissions clause. The settlement did not provide for a bargaining order in view of the Union's opinion that it would win the election.

not really a committee, but rather consisted of all of the employees.

Morrison conceded that the above-named employees alleged by Respondent as agents were prounion employees. All of them regularly attended union meetings, but did not address employees at these meetings. However, attendance was very high at union meetings with anywhere between 15 to 50 employees in attendance at each meeting and over 90-percent attendance at the first two meetings.

Garza, Kmiec, and Randolf acted as designated observers for the Union in the June 7 election. They also sold tickets for a union picnic held in May. Additionally, Randolf, Sheffield, and Garza on two occasions distributed some union leaflets to employees. On one occasion, Florence Davis distributed some union authorization cards among the employees and obtained their signatures. She returned the signed cards to union representatives. With the exception of Ellen Garza, discussed in detail below, none of these employees was paid in any way by the Union. Additionally, these employees as well as a majority of Respondent's employees from time to time conversed with union representatives outside the plant as they came to and left work.

As to Dorothy Owens, Elestine Randolf, Mary Sheffield, Fanny Taylor, Rudy Newsome, Dorothy Kmiec, Shelly Woodly, and Florence Davis, the evidence establishes that, at most, these employees were prounion employees and not agents of the Union. I attach no significance to Respondent's observation that all of the above employees except for Kmiec and Garza were black. Their activities were generally limited to attendance at union meetings, acceptance of union literature, and brief conversations with union agents on various occasions as the employees entered and left work. The evidence establishes that a majority of the employees engaged in similar conduct. As set forth above, the evidence established that attendance at union meetings was generally high with anywhere from 15 to 50 employees attending each meeting and over 90-percent of the employee complement attending the initial two meetings conducted by the Union. Additionally, a majority of the employees frequently stopped to converse with union officials when entering and leaving the plant. In this connection, it is admitted that the majority of employees received directly from union representatives each piece of union literature as they entered or left the building. Moreover, Respondent Supervisor Ed Conquest testified that, in addition to the above employees alleged as agents, he observed over 50 employees who stopped to talk with Morrison in similar manner as the alleged agents.

Nor do I find particularly significant that Randolf, Kmiec, and Garza acted as union observers during the election and sold tickets to the union picnic held in May, or that Randolf and Sheffield distributed on two occasions union leaflets to employees and Florence Davis on a single occasion distributed authorization cards to employees. I conclude that such minimal activities are insufficient to establish an agency connection between the Union and the employees sufficient to attribute acts of employees to the Union.

The Board has consistently held the facts that an employee serves as a union observer or is prominent in an organizing campaign does not make him an agent of the Union, and the Board is reluctant to set aside an election because of the misconduct of such employee. *Connecticut Foundry*, 247 NLRB 1514, 1520 (1980); *Tennessee Plastics*, 215 NLRB 315 (1974); *Zero Foods Co.*, 214 NLRB 764 (1974); *Owens-Corning Fiberglas Corp.*, 179 NLRB 219 (1969); *Mine Workers of America District 30 (Terry Elkhorn Mining Co.)*, 163 NLRB 562 (1967).

In connection with Ellen Garza, Archer Cole, president of District 3 of the Union, testified that he personally knew Ellen Garza and her husband, who was affiliated with another labor organization. Sometime in the beginning of February, Ellen Garza met with Cole in his office to inquire about employment at one of the neighboring plants. Cole referred her to a list kept by the Union of organized and unorganized plants. One of the plants on the union list for organization was Respondent.

Sometime around the end of February, Ellen Garza again contacted Cole and informed him that she had obtained employment at Respondent. She asked him whether the Union could provide financial assistance to her for her child's nursery school so she could keep her job at Respondent. Cole agreed to pay her $50 a week, which was charged on the Union's books as an "organizing expense." Weekly payments of $50 began on the week ending March 2, and concluded on the week ending June 8, the day after the election.

Additionally, between April 4 and June 6, Garza visited Cole's office on about five separate occasions. On each occasion Garza contacted Cole by telephone and requested the meeting. During these meetings, Garza would discuss the progress of the campaign with Cole and offer various suggestions. On each occasion the Union reimbursed Garza for food and traveling expenses. There is no evidence to establish that employees regarded Garza as an agent of the Union. Indeed there is no evidence that employees were aware of her payments by the Union or meetings with Cole.

In view of the fact that the only objectional conduct attributed to Garza was directed to employee Madeline Girgess, whom I have concluded below, to be a totally incredible witness, entirely unworthy of belief, I do not make any findings as to whether Ellen Garza is an agent of the Union.

E. *Threats, Intimidation, and Harassment of Employees, and Appeals to Racial Prejudice*

Respondent's Objections 3, 5, 7, and 8

The only alleged objectionable conduct directly attributable to a union representative during the entire campaign took place between International representative Harold Morrison and employee Anthony Pollard. Sometime during the April-May period of the union campaign, employees Charlie Witlock and Anthony Pollard (both of whom are black) arrived at Respondent's facility in a car driven by Witlock to begin work. At this time Morrison, also black, was in front of Respondent's facility, distributing union leaflets. Pollard usually rode to work

with Witlock. Witlock, a known prounion employee, stopped his car and accepted a leaflet from Morrison. At this point he raised his fist to Morrison and said, "The Union is getting in." Witlock and Morrison laughed. Pollard, a known antiunion employee, sitting next to Witlock, said to Morrison, "Fuck you and your Union." Morrison replied, "Tony, don't be a house nigger for nobody." Morrison and Witlock then laughed. No other employees were present at this time. No further conversation took place between Morrison and Pollard at this time. Pollard and Witlock then entered the plant and began work.

When Pollard was questioned by Respondent's counsel how he interpreted Morrison's "house nigger" statement to him, he replied, "I took it like he [Morrison] was saying that I was some kind of go-fer for the Company."

When Respondent counsel asked Morrison whether he believed that his use of the phrase "house nigger" as directed to Pollard was a bad word Morrison replied, "Not to me. Not to use it among ourselves, among our race no." When Respondent counsel pursued this line of inquiry and questioned what he meant by his "house nigger" statement, Morrison replied that the phrase in his mind denoted a master-slave mentality.

Shortly after Pollard entered the plant and commenced work following Morrison's "house nigger" statement, he wrote a letter to Morrison which he gave to fellow employee George Allen to deliver. Allen delivered the letter to Morrison. The letter stated, "Take your IUE and shove it up your ass." The letter was signed, "Little House Nigger."[11] After Pollard had the letter delivered to Morrison, he testified he asked his supervisor if he could be assigned overtime work because he "didn't want to go out there and face those people [union representatives] after I wrote that letter." Pollard was assigned the overtime he had requested and was able to leave work after Morrison and other union representatives had departed.

A day or so after Pollard wrote the above letter to Morrison, Pollard testified that employee Dorothy Owens approached him and told him he should not have written the letter to Morrison because, if the Union came in, Morrison would be the employees' representative and it would be hard to work with Morrison as a result of this letter, and that if he needed Morrison's help, Morrison might not help him.

Several days later, during lunch hour, employees Frances Kelly, Fred Henderson, Charlie Witlock, and Rudy Newsome were outside Respondent's facility talking to Morrison. At this point Pollard walked over and Witlock said, "Here comes the house nigger." All of the above employees were black. There is no evidence that other employees were present at this time. Pollard walked away. Morrison said nothing. Following the lunch hour, the above employees accompanied by Pollard returned to work. Frances Kelly, a slight, female employee, continued to rib Pollard by laughingly calling him "an Uncle Tom" and "house nigger." Pollard testified he was angered by Kelly's ribbing and turned on her and told her that if she called him that again he was going to "knock her out." Present during this altercation between Pollard and Kelly were the above-named employees. Additionally, Respondent Supervisors Ed Conquest and Walt Frank were also present. When Pollard threatened to "knock Kelly out," Rudy Newsome, who was Kelly's boyfriend at the time, began scuffling with Pollard. During this scuffle, he attempted to pull a knife from a sheath on his belt which he had always worn and which was plainly visible on his belt. Supervisor Conquest broke up the scuffle and both employees returned to work. Neither Pollard or Newsome was disciplined by Respondent in any way for their conduct. To the contrary, Newsome was subsequently promoted to the position of supervisor and continued to carry a knife affixed to his belt. Additionally, prior to and subsequent to the incident Pollard and Newsome were and are presently friends.

Several days after Pollard's conversation with Morrison and following his conversation with Dorothy Owens and his confrontation with Frances Kelly and Rudy Newsome, Pollard testified that he approached Morrison outside Respondent's facility and told him he wanted to straighten things out. He told Morrison he did not like being called a "house nigger." Morrison apologized if he offended him and told him, "I don't care if you vote for the Union or the Company, everyone has a right . . . to make up their own mind." Pollard then told Morrison that some of the employees had told Pollard that Morrison would not help him if the Union was elected and he had a problem. According to Pollard's testimony, Morrison replied, "Pollard, if we win or lose the election I'll stand behind you." Morrison's testimony corroborates Pollard's testimony as to this conversation.

Morrison specifically denied ever telling Pollard that if he did not vote for the Union his job as leadperson was not secure or that he would lose his job.

I conclude that Morrison's statement to Pollard imploring him not to be a "house nigger" did not contain any threat, expressed or implied, nor could it be reasonably concluded that such remark was intended to or did intimidate Pollard or Witlock. In this respect Witlock laughed when Morrison made the statement and Pollard interpreted the statement as imploring him not to be a "go-fer" for Respondent. Therefore, the only contention that Respondent could reasonably make would be that the statement was intended to and did inflame the racial feelings of the voters in the election.

At the outset it is noted that the remark was made by a black man to another black man in the presence of a third black man. Moreover, the testimony of Pollard and Morrison establishes that Morrison intended and Pollard understood the intention of Morrison to convey to Pollard Morrison's feeling that Pollard by his pro-Company position was exhibiting a master-servant type of mentality. The "house nigger" statement, in my opinion, amounted to no more than a plea by Morrison that Pollard abandon his servant-type mentality, and join those employees in favor of the Union. Moreover, Morrison later apologized to Pollard for making such statement. I

[11] Morrison testified that the letter he received from Pollard stated, "Kiss my ass." I see no real distinction concerning the discrepancy between the testimony of Morrison and Pollard as to the contents of the letter. Morrison testified he did not retain the letter.

do not find such an isolated statement made by one black man to another, to a single employee, out of 120 unit employees, to constitute objectionable conduct. The Board held in *Sewell Mfg. Co.*, 138 NLRB 66 (1962), that campaign propaganda calculated to inflame the racial prejudices of employees by deliberately overemphasizing racial feelings through irrelevant and inflammatory appeals is the basis for setting aside an election. I conclude that Morrison's statement to Pollard does not fall within the rationale set forth in *Sewell Mfg. Co.*, supra. Accordingly, I do not consider Morrison's statement to be objectionable conduct.

I find no merit in Respondent's contention that Pollard was so intimidated by Morrison's "house nigger" statement to him that he requested that he be assigned overtime in order to avoid meeting the union representatives upon leaving work. The evidence established that, following Morrison's statement to Pollard, Pollard wrote Morrison a letter in which he stated, "Take the IUE and shove it up your ass." The letter was signed, "Little House Nigger" so that Morrison would know who sent it. I conclude that it was Pollard's letter to Morrison which was responsible for any fear that Pollard may have felt and it was his letter which prompted his request for overtime to avoid meeting Morrison upon leaving the plant. Pollard admitted this.

Nor do I find employee Dorothy Owens' statement to Pollard to the effect that he should not have written Morrison the letter because Morrison, as union representative, might not represent him. In this connection, the evidence established that Dorothy Owens was not an agent of the Union. Therefore, her statement to Pollard amounted to no more than an employee's statement of opinion to another employee of the possible consequences of his actions. Moreover, Pollard conceded that, following his conversation with Owens, he spoke with Morrison who specifically disavowed Owens' prediction and assured Pollard that he would stand behind him and represent him. Therefore, even if it could be argued that Owens was an agent of the Union, the evidence clearly established that Morrison fully disavowed any objectionable conduct by Owens. Accordingly, I do not find the statement by Dorothy Owens to Anthony Pollard to constitute objectionable conduct.

Similarly, I do not find the incident involving Pollard, Frances Kelly, and Rudy Newsome to constitute either threatening or intimidating conduct or an appeal to racial prejudice. In this regard Kelly's statement to Pollard calling him a "Uncle Tom" and "house nigger" constituted obvious ribbing. As set forth above, the entire incident involving Kelly and Newsome took place in the presence of black employees. Moreover, I have concluded that Kelly was an employee and not an agent of the Union. Therefore, her expression of opinion cannot be attributed to the Union. In connection with the subsequent scuffle between Pollard and Newsome, wherein Newsome attempted to pull a knife from his belt, I conclude that the scuffle resulted directly from Pollard's ill-considered threat to "knock [Kelly] out." Moreover, Supervisors Ed Conquest and Walt Frank were present during the entire incident and broke up the scuffle. Neither Pollard nor Newsome was disciplined; in fact Newsome who carried the knife in his belt prior to and subsequent to the union campaign was ultimately promoted to a position of supervisor.

Sometime during the second or third week in April, employees Elestine Randolf and Maria Diaz, working on the second shift, became engaged in an argument as to which employee would perform cutting operations and which employee would perform connecting operations. It appears that the different work was performed on an alternating day basis by these two employees. On this particular occasion, Randolf claimed that it was her day to cut and Diaz' to do connect. At some point during their argument, Supervisor Ed Witkowski intervened. Randolf told Witkowski that it was her day to cut. Daiz, who spoke broken English, motioned employee Jorge Chavez over to act for her as an interpreter. Witkowski told Randolf to let Diaz continue to cut and Randolf to connect. Randolf testified that upon departing she told Diaz that she would be glad when the Union came in, then seniority would mean something. She specifically denied telling Diaz how she should vote or that she had better vote for the Union as contended by Respondent.

Witkowski testified that upon leaving Randolf pointed a finger at Diaz and said, "Things were going to change when the Union gets in and that she better vote for the Union."[12]

An examination of Witkowski's testimony established that he generally had a vague recollection of the facts surrounding the incident. Such testimony was contrasted by Randolf's clear recollection of the facts of this incident as well as other incidents to which she testified. Moreover, based on comparative demeanor, I was more impressed with Randolf's demeanor. She answered all questions put to her forthrightly and in detail on both cross- and direct examination. Further, her answers on cross-examination were consistent with those on direct. In contrast, on cross-examination Witkowski's version of Randolf's statement to Diaz varied to an extent.

Additionally, it appears to me that Randolf's version is more logical. The testimony throughout this hearing establishes that the employees were generally dissatisfied that seniority was not considered by Respondent with regard to work assignments, overtime, and promotions. Therefore, upon losing the work assignment to Diaz, it would appear logical that Randolf, a prounion employee, would comment that, after the Union came in, seniority would mean something, such comment implying that with the Union as a representative she would have been awarded the work assignment rather than Diaz. It does not appear logical to me that, in the context of this discussion, Randolf specifically denied telling Diaz during this discussion how she should vote or that she had better vote for the Union. Accordingly, I credit Randolf.[13]

[12] Diaz was not called by Respondent as a witness.

[13] I credit Randolf notwithstanding her candid admission during cross-examination that she had received warnings for lateness, absence, and work quality that she was subsequently terminated and that on one occasion had been convicted of welfare fraud.

As set forth above, I have concluded that Elestine Randolf and other employees alleged as agents by Respondent were not agents of the Union, but rather merely rank-and-file employees. The Board has long held that far less weight is to be accorded to the conduct of rank-and-file employees than that of parties to an election in considering election objections. *Six Flags Over Mid-America*, 253 NLRB 111 (1980); *Beaird-Poulan Division v. NLRB*, 649 F.2d 589 (8th Cir. 1981); *NLRB v. Mike Yurosek & Sons, Inc.*, 597 F.2d 661 (9th Cir. 1979). Additionally, the Board has held that where it is alleged that rank-and-file employees have engaged in objectionable conduct, an election will be overturned only if the conduct is sufficient to have created an atmosphere of fear and reprisal such as to render a free expression of choice impossible. *Six Flags Over Mid-America, Beaird-Poulan*, and *Mike Yurosek & Sons, Inc.*, supra.

Applying this rationale to the conversation between Diaz and Randolf, I conclude that Randolf's statement does not nearly come within that standard of conduct required to set aside an election. Moreover, my conclusion would be the same if I had credited Witkowski's testimony.

Elestine Randolf was one of several employees selling tickets for the union picnic scheduled for May 20. She approached employee Kim Smith who worked on the second shift with her and Smith purchased $6 worth of picnic tickets. Several days after the picnic had been held on May 20, Smith, evidently unable to attend the picnic, approached Randolf and asked for her money back. Randolf told Smith she could not return the money because she had turned it over to the Union before the picnic and it was too late for refund. An argument ensued between Smith and Randolf, both black employees, during which Smith started screaming at Randolf. At this point their supervisor, John Kulaszewski, came over and asked Smith what was wrong. When Smith complained about Randolf's refusal to give her a refund, Kulaszewski handed Smith $6 from his pocket and both parties walked away. Respondent contends this confrontation between Smith and Randolf was objectionable conduct.[14]

I conclude that the confrontation between Smith and Randolf did not meet the Board's standards for creating an atmosphere for fear and reprisal nor was it an appeal to racial prejudice, such as to render free expression of choice impossible. Accordingly, I do not find Randolf's statement to Smith in this connection objectionable conduct. Moreover, as set forth above, Randolf is an employee and not a union agent. It is clear that under these circumstances such conduct by an employee falls infinitely below applicable Board standards for objectionable conduct by an employee.

Kim Smith further testified, pursuant to leading questions put to her by Respondent counsel, that on one occasion, sometime during the union campaign, Randolf told her that if she crossed a union picket line she would be hit by sticks and that she had to vote yes for the Union. Smith also testified pursuant to leading questions that, on another occasion, Randolf told her that Respondent was giving the employees raises to keep them from voting for the Union and that, with the Union, employees would have job security and, without a Union, they could be terminated at any time. Randolf then asked her if she was going to vote for the Union and Smith replied she did not know.

Randolf credibly testified that she had but a single conversation with Smith during the union campaign concerning the Union. During this conversation she told Smith that she would like her to vote for the Union but whatever she did she should vote. Randolf specifically denied stating to Smith she would lose her job if she did not vote for the Union. She also denied telling Smith that she would be hit by sticks if she crossed the union picket line and that she had to vote for the Union. For the reasons set forth immediately below, I credit Randolf.

As described above, I found Randolf to be a credible witness.

Moreover, I find Smith to be a totally incredible witness, entirely unworthy of belief. I base this assessment on several factors. During her testimony, Smith admitted that her testimony in this hearing, under oath, would have been different if certain persons present in the hearing room, whose names Smith refused to disclose, were not present. Such admission by Smith is tantamount to an admission that her testimony was not truthful. Secondly, Smith's testimony was directly contradicted by her Board affidavit (which Smith, upon being shown her statement, could not recall) wherein she stated that Randolf never spoke to her about the Union during the entire union campaign, except to remind her to vote. Moreover, Smith specifically denied in her Board affidavit that Randolf or any other employee told her that if she did not vote for the Union she would lose her job.

Additionally, Smith's testimony was primarily obtained by counsel for Respondent through extensive and detailed leading questions necessitated by her poor recollection. Smith further exhibited a poor recollection of events when during cross-examination she denied attending any Respondent meetings or receiving any Respondent literature. In this connection, it is admitted that Respondent held weekly meetings at which all employees attended and it distributed 20 separate copies of campaign literature to all employees.

Employee Madeline Girgess, currently employed by Respondent, testified that, during the union campaign, she went to several union meetings. Pursuant to a series of leading questions put to her by Respondent counsel, Girgess testified that in her opinion, during the union campaign, a serious division developed between black and white employees, that black employees were constantly trying to push the Union which caused a real division within the plant. She also testified, again pursuant to leading questions by Respondent counsel, that the Union used these tactics to divide employees along racial lines and to enable them to win the election. Through a series of further leading questions by Respondent counsel, Girgess testified that the Union was trying to make the blacks and whites come apart so the Union could

[14] It could be argued that the payment of $6 to Smith by Supervisor Kulaszewski was a grant of a benefit by Respondent and a violation of Sec. 8(a)(1).

win the election. Girgess was unable to supply facts to support her conclusory testimony alleged by Respondent as objectionable conduct.

Girgess did testify that, at a union meeting, union representative Ted Kenney, who is white, told her that the Union was trying to create the impression that black people were poor people and trying to convince all black people to vote for the Union. Kenney further told her that white people take advantage of black people and do not give blacks an opportunity to become a boss. Girgess also testified that Kenney told her that, if the Union had a strike, she would lose her job and that if there was a strike and she tried to go to work the Union would stop her.

On cross-examination Girgess admitted that what Kenney told her was that black people did not enjoy the good jobs enjoyed by whites and that blacks, in order to elevate themselves, had to work harder than whites. Girgess further admitted during cross-examination that Kenney told her that he believed blacks and whites should be treated equally and fairly. Further, on cross-examination, Girgess repudiated her direct testimony and admitted that Kenney had not told her that if there was a strike she would lose her job. Rather, she admitted that Kenney told her if there was a strike the Union would give her strike money every week.

Kenney testified that he spoke to Girgess about a possible union strike during a union meeting which took place about a year after the election. Kenney credibly denied making a statement to Girgess or any employee about attempting to create a situation where blacks and whites would come apart so the Union could win the election. Kenney further denied making a statement to Girgess or any employees that black people in the plant had to work harder than whites or that white people would take advantage of blacks.

Girgess also testified that, at one point during the union campaign, employee Ellen Garza told her that the Union had good benefits and could get employees more money and that she, Girgess, should vote for the Union. She also told Girgess that the Union was strong and going to win. Girgess testified that she told Garza that she liked Respondent without a union and that Garza responded that if she, Girgess, did not vote for the Union, maybe something was going to happen, like she could not find her car or something like that.[15]

Girgess further testified that, following this conversation with Garza, she spoke to other employees, whose names she refused to disclose, but who she claims told her that the Union was Mafia oriented.

Girgess additionally testified that, sometime during the campaign, she had a conversation with Loretta, a black employee, who told her the Union was good but that if there was a strike she would have to go on strike. Girgess stated that she would work rather than strike and Loretta replied that the Union would stop her—nobody would be able to work during the strike.

I totally discredit Girgess' entire testimony for the following reasons. During the course of Girgess' testimony, Girgess admitted that her testimony would have been different if union official Harold Morrison and employee Elestine Randolf were not present in the hearing. Such admission is sufficient in my opinion to discredit her entire testimony.[16] Secondly, Girgess' recollection of the facts was so vague throughout the course of her entire testimony that almost all of her testimony was obtained through extensive leading questions put to her by Respondent counsel. Additionally, during cross-examination, Girgess denied that Robert Giessler, Respondent's president, or any other Respondent representatives at any time during the entire union campaign, spoke to the employees concerning the Union either singularly or in groups, or distributed any campaign literature to employees. It is admitted by Respondent that weekly meetings were conducted by Giessler and other Respondent representatives which all employees attended and that, during the course of the campaign, Respondent, distributed extensive antiunion literature to all employees. Girgess' inability to recall such Respondent meetings and literature suggests either a poor recollection or a blatant hostillity toward the Union. In either event, it sheds serious doubt as to her credibility. Additionally, an affidavit taken by Respondent counsel shortly after the election did not include anything regarding statements by Kenney or Garza. Further, during cross-examination by both counsel for the Union and the General Counsel she was frequently evasive, nonresponsive, and flagrantly hostile.

For all of the above reasons, I conclude that Girgess' testimony is totally incredible and entirely unworthy of belief.

Respondent was unable to present any other witnesses who could give direct testimony concerning threats, intimidation, or appeals to racial prejudice during the campaign.[17] Respondent's counsel did present the following witnesses who gave hearsay or subjective testimony as to threats, intimidation, or appeals to racial prejudice by union agents or employees.

Respondent Supervisor Ed Witkowski testified that, sometime during the latter part of March or early April, he was talking with employee Jorge Chavez when another employee, Kathy Torrez, joined them. Torrez then stated "that Spanish speaking employees were afraid because they had been threatened." Witkowski was unable

[15] Union counsel stated the Union was unable to produce Garza to testify because they were unaware of her present address.

[16] Under a sequestration rule imposed by me during the hearing pursuant to a motion by counsel, union representative Harold Morrison and employee Randolf were persons authorized to be present at all times during the course of this hearing.

[17] Objections to such testimony were made by counsel for the General Counsel and counsel for the Union. Respondent counsel contended that the rule of evidence applicable to representation proceedings set forth in Sec. 102.66 of the Board's Rules and Regulations provide in part that "the Rules of Evidence prevailing in courts of law or equity shall not be controlling" and would permit introduction of such hearsay and subjective testimony. Upon listening to the hearsay and subjective testimony introduced by Respondent pursuant to this section, I sustained objections by the General Counsel and by counsel for the Union to the introduction of such testimony, based on my conclusion that such testimony was so vague and conclusory as to be totally worthless and unreliable. Such objections were sustained by me with the further ruling that whether pursuant to the rules of evidence followed traditionally in unfair labor practice proceedings, or whether pursuant to rules of evidence set forth in Sec. 102.66 as applicable to representation proceedings, the testimony elicited was so unreliable, worthless, and so subjective as not to have any probative value.

to testify as to what threats were made or who made such threats.

Witkowski also testified that, on being promoted to a shift supervisor, sometime during the end of March, he observed that, during coffee and lunch breaks, employees generally wandered freely through the plant in little groups and were, to his observation, friendly. However, commencing with the beginning of the union campaign, the Spanish-speaking employees began congregating together in a single group. This appeared to suggest to Witkowski that the members of the Spanish group did not want to be singled out. Witkowski testified that he observed such groupings of Spanish-speaking employees a total of six times during the union campaign.

Supervisor John Kulaszewski, also called John K, testified that, sometime during the union campaign, he had a conversation with employee Frank Chaves who told him that Chaves had a conversation with employee Brenda Blakely and that, during Chaves' conversation with Blakely, employee Florence Davis approached Chaves and Blakely and gave Blakely a dirty look. David then told Blakely that she did not want Blakely to talk to Chaves. Kulaszewski then testified that Chaves told him that shortly afterward Davis told Blakely and Chaves that the Union would take care of Blakely's baby when she gave birth. (Florence Davis credibly testified that she saw Blakely talking to Chaves and assumed it might be about the Union and, because of Respondent's regulations prohibiting employees talking about unions on working time, she told Brenda she was not supposed to talk about the Union on company time. Davis denied any statement concerning the Union taking care of Blakely's baby.)

John Kulaszewski also testified that he had several conversations with employee Susan Boordman during the union campaign and that, during such conversations, she told him that she did not want a Union. Kulaszewski then testified that, shortly before the election, he observed Boordman wearing a union button. He asked Boordman why she was wearing a union button and she responded, "Do you think I'm crazy? Do you want me to get killed?" She then told Kulaszewski that there was a lot of tension in the Company. (It is noted that such testimony was obtained as the result of an interrogation by Kulaszewski, which could constitute an unlawful interrogation within the meaning of Section 8(a)(1) of the Act.)

Kulaszewski also testified that he had a conversation with Supervisor Ed Witkowski who told him that one of the Spanish employees felt he and other Spanish employees were being threatened. Kulaszewski was unable to identify the Spanish employee who spoke with Witkowski or those Spanish employees who felt they were being threatened. Nor was Kulaszewski able to testify as to the nature of the alleged threat.

Kulaszewski also testified that, on the day before the election, employee Gita Patel, who was scheduled to vote with the second-shift employees, asked him if she could vote with the first-shift employees because she was afraid. Kulaszewski was unable to testify as to why Patel was afraid. (Gita Patel who testified as a witness for Respondent during this hearing did not testify as to such request.)

After exhausting Kulaszewski's testimony counsel for Respondent offered, as a past recollection recorded, from Kulaszewski's affidavit, the following:

> "Edward Robles [an employee] seemed to change his personality about a week before the election. Before that time Robles had not been afraid to speak out about things. About a week before the election however, he became scared and cautious and did not want to talk about anything. This was very unusual for him."
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> . . . . .
>
> "Carmen Chavez is an employee on the third shift at Vitek. On the day of the election, which I worked all day, several black women employees woke up Carmen from a nap which she was taking at lunch time, and asked her to go to the lunch room because they wanted to talk to her. I walked into the lunchroom with Carmen and told Carmen that I needed to discuss her vacation plans with her and Carmen then left the lunch room with me. Soon however, the black women employees told Carmen to come back into the lunch room. Later Carmen seemed very cold toward me, which was unusual because we're good friends."

Supervisor Ed Conquest testified that about 3 weeks prior to the election he had a conversation with employee Gita Patel, who told him that employee Pushpa Patel (no relation to Gita Patel) had told her Gita Patel that Pushpa Patel had been threatened by employee Elestine Randolf. Conquest then testified that, following this conversation with Gita Patel, he asked employee Pragna Patel (no relation to Gita or Pushpa Patel) if she (Pragna Patel) was aware of threats to Pushpa Patel. Conquest testified that Pragna Patel told him that Pushpa Patel had told Pragna Patel that Pushpa Patel was threatened by someone. According to Conquest, Pragna Patel did not disclose to him the name of the employee who allegedly threatened Pushpa Patel nor the nature of the threat. Conquest then testified that, several days after his conversation with Gita Patel and Pragna Patel described above, he asked Pushpa if she had been threatened by anyone and Pushpa Patel told him she was threatened but she was not going to mention any names. Conquest testified that during his conversation with Pushpa Patel she appeared upset when he was talking to her.

Conquest also testified that, someone shortly before the election, during a conversation with employee Pat Hriczko, Hriczko told him that she intended to vote against the Union. A few days later Conquest observed Hriczko wearing a union button and asked her why she was wearing it. Hriczko told him she felt safer and was afraid not to wear the union button. Conquest testified that during this conversation Hriczko appeared to be afraid. (It is noted that such interrogation of Hriczko by Conquest could constitute an unlawful interrogation in violation of Section 8(a)(1) of the Act.)

Conquest also testified that, during the election campaign, he questioned about 40–45 employees on his shift

and asked them whether they were intimidated or harassed by the Union. He admitted that no employees told him of any intimidation, but about 30 of them informed him that they felt "tension."

Supervisor Leon Shorey testified that sometime during mid-May employee Kim Smith asked him if she was going to lose her job if she voted for the Union. Shorey asked her why and Smith replied she was told by other employees (whom she did not name) that she would lose her job unless she voted for the Union.

Shorey also testified that, several days before the election, he noticed employee France Gangitano wearing a union button. Shorey asked Gangitano why she was wearing a union button and Gangitano replied she had to wear it or else. (It is again noted that such interrogation of Gangitano could cosntitute an unlawful interrogation in violation of Section 8(a)(1) of the Act.) Shorey also testified that sometime in April he had a conversation with employee Marcello Robles where Robles indicated he was not in favor of a union. Shorey then testified that, in mid-May, Robles told him he was going to be voting for the Union because there would be trouble for the Spanish employees if he did not. (There was no evidence submitted as to what trouble Robles was allegedly referring to.)

Employee Kim Smith testified that, sometime during the union campaign, employee Pat Hriczko told her that she, Hriczko, spoke to employee Dorothy Owens who told Hriczko that, if Hriczko crossed the picket line, she would be hit.

Smith also testified that, sometime during the campaign, she was told by Pragna, Pushpa, and Gital Patel that, if they crossed the picket line, they would be hit. (In view of my findings that Kim Smith is a totally incredible and unreliable witness as described above, I would additionally discredit this hearsay testimony.)

Pragna Patel testified that, sometime during the campaign, she had a conversation with Pushpa Patel during which conversation Pushpa told her and Gita Patel that Pushpa Patel does not talk about the Union because employee Elestine Randolf had told Pushpa Patel that, if she sided with Respondent or voted for Respondent, the Union would give her a hard time. Pragna Patel further testified that, during this conversation with Pushpa Patel, Pushpa appeared to be afraid. (Elestine Randolf testified that, during the election campaign, she did indeed speak to Pushpa Patel concerning the Union. During a conversation with Pushpa Patel, she told her that employees were having a "hard time" with no union to represent them but that with a union the employees would enjoy greater benefits and seniority would mean something. Randolf further testified that during this conversation she asked Pushpa to please vote in the upcoming election.)

By an offer of proof, Respondent's attorney contends that Gita Patel would have testified that she, Gita Patel, knew Pragna and Pushpa were afraid of the Union because they were unusually quiet and never talked about the Union during the union campaign. By further offer of proof, Respondent's attorney contends Gita Patel would have testified that other employees were also afraid of the Union generally based on her observation of their general demeanor.

Carol Falcone, employed by Child Craft as a personnel manager (Child Craft was subpoenaed by Respondent concerning Respondent's objection as to an alleged misrepresentation of Respondent wages described below), testified that she was present on January 6, the opening day of this hearing pursuant to a subpoena served upon her by Respondent counsel, and that seated in the hearing room was a woman who Falcone assumed was a former employee of Respondent, talking to another woman seated next to her about the pending hearing and the Union generally. Falcone testified that, during this discussion, the women whom she assumed to be a former Respondent employee stated to the other women, "Remember when they made us wear the buttons." The other women responded, "I don't remember any of that," and according to Falcone insinuated that she would testify at the hearing that she did not remember it and that it was not important. (Falcone was unable to identify any of the individuals referred to above.)

Respondent contends that the first paragraph of a union leaflet distributed by employees on April 26 was designed to and did intimidate employee voters.

The paragraph alleged to have created such intimidation is set forth as follows:

> As a result of your confidence in our Union, the IUE, AFL–CIO, we were able to get an election to be held on THURSDAY, JUNE 7, 1979 to be conducted and supervised by the U.S. National Labor Relations Board. This election will be by *secret ballot*, which means that no one will ever know how you voted. All Vitek employees in the bargaining unit as of April 27, 1979 are eligible to vote, *whether they are U.S. citizens or not.*" [Emphasis added.]

When counsel for Respondent questioned Morrison as to why this paragraph was included in the April 26 leaflet, Morrison credibly and without contradiction testified that a number of employees had informed him at a union meeting that company supervisors had told them that, if they did not vote against the Union, they could be deported.

I find nothing contained in the above paragraph to be intimidating in any manner. The objected-to paragraph merely sets forth the date of the scheduled election and informs all empoyee voters that the vote will be a secret-ballot vote and that all employees whether U.S. citizens or not, are entitled to exercise their right to vote if they were employed as of April 27, 1979. Moreover, when questioned as to why it was necessary to include the phrase "whether U.S. citizens or not" Morrison credibly testified, without contradiction, that the sentence was added because of concern expressed to Morrison by some of the voters about threats of deportation made by Respondent's supervisors.

I do not find the paragraph above, or any part thereof, to be threatening, coercive, or intimidating. Accordingly, I do not find the above leaflet to constitute objectionable conduct by the Union.

On June 5, the Union mailed the following leaflet to all employees:

Dear Friends:

As this election campaign comes to a close, I would like to express my sincere appreciation to all Vitek employees for the cooperation and understanding you have shown us.

We are hopeful that the type of campaign conducted by the union will lead to a better life for each of you. The election on Thursday will be your opportunity to assure your independence and dignity for the future.

As a black man myself, I have learned the hard way that nothing is handed to anyone on a silver platter and that we are conditioned from childhood to struggle to get to first base.

The history of the United States shows that all of us at one time or another were minorities and have had to struggle to make progress for ourselves and our children.

As a result of the efforts of unions like the IUE-AFL-CIO, we have been able to join together, shoulder to shoulder, and make our gains together in the face of attempts by companies to keep us apart and thereby keep us all down.

This has also been the case at Vitek. Workers have been separated into different shifts and on to different types of jobs in order to keep us apart so that the company would have the advantage over all of us.

By bringing the IUE in, we expect to bring the Vitek employees together in one strong union with proper representation for all and a common program to be negotiated with the company for the benefit of all.

As some of you know, my son just graduated from Duke University. For four years, he played on the Duke basketball team and his play has been followed by scouts from the NBA.

I, myself, am a basketball player and resent the fact that the company, in putting up a basketball court behind the plant, would use it to try to influence votes in this election.

Ever since IUE came on the scene, it is obvious to all that the company had been "born again" and in order to defeat the union is offering all sorts of tidbits *for the time being*, such as basketball, softball, free drinks, disco, etc.

From my personal observation, the company cannot win the vote of Vitek workers through these obvious handouts.

When you vote on Thursday, there's only one point at issue and that is the future of yourself and your family. By voting YES for IUE, your wages, your conditions on the job, and your insurance are all protected through a negotiated IUE contract.

Without it, you will go back to the "good old days" before IUE came on the scene and the company won't even have to offer you softball or soft soap.

I look forward to our working together for a long time to come.

In connection with this letter, Respondent counsel contends that the following paragraphs were designed to create an atmosphere of fear, divisiveness, and racial tension among Respondent employees.

"As a black man myself, I have learned the hard way that nothing is handed to anyone on a silver platter and that we are conditioned from childhood to struggle to get to first base."

"As a result of the efforts of unions like IUE-AFL-CIO, we have been able to join together, shoulder to shoulder, and make our gains together in the face of attempts by companies to keep us apart and thereby keep us all down."

"This has also been the case at Vitek. Workers have been separated into different shifts and on to different types of jobs in order to keep us apart so that the Company would have the advantage over all of us."

Respondent further contends that the following paragraphs set forth in the Morrison letter were false and implied that employees would lose benefits by voting for Respondent:

"Even since IUE came on the scene, it is obvious to all that the company has been "born again" and in order to defeat the union is offering all sorts of tidbits *for the time being*, such as basketball, softball, free drinks, disco, etc."

"From my personal observation, the company cannot win the vote of Vitek workers through these obvious handouts."

Viewing the entire letter to the employees as a whole and each paragraph separately, I find nothing objectionable contained therein. I find no paragraph nor any sentence therein which would, when viewed in the context of the entire letter, intimidate, coerce or appeal to racial hatred or tension among employees. Rather, I conclude that the letter exorts "all" employees to "join together shoulder to shoulder" with the Union as their common representative in order to achieve improvements in working conditions for the benefit of *all* employees regardless of race. I conclude that the reference by Morrison to himself, as a black man, who was conditioned from childhood to struggle in order to get ahead, is merely a personal example, common to minority populations throughout the United States. As set forth and described above, Respondent employee complement consisted of males and females of various racial origins. This letter appeals to *all of them to join together* through the Union in order to achieve a common improvement for all employees in working conditions. It does not appeal to any one race nor does the effect of the letter in any way place or attempt to divide one race against another. With respect to the paragraph which sets forth: ". . . workers have been separated into different shifts and on to different types of jobs in order to keep us apart so that the company would have the advantage over of all us," Morrison credibly and without contradiction testified in response to Respondent counsel's questions that this paragraph was specifically inserted in the letter as the result of a complaint by employee Dorothy Kmiec, a white employee, who complained to union representative Kenney that her supervisor asked her why she did not

transfer to another shift and work with her own kind. (Kmiec was employed on Respondent's second shift which was virtually an all-black shift.) Morrison testified that the Union felt that such attempts at racial division by Respondent was wrong and, for this reason, the paragraph was inserted in Morrison's letter. Respondent did not call either Kmiec or Kmiec's supervisor or otherwise rebut Morrison's testimony in this connection. In view of this, I credit Morrison's testimony as to the reason for the insertion of this paragraph and do not find that such paragraph in any way coerced, intimidated, or promoted any racial divisiveness.

With respect to the paragraph in the Morrison letter referring to the basketball, softball, free drinks, disco offered by Respondent as a means of defeating the Union, Respondent did not dispute that such enticements were offered. That the Union concludes that such enticements were offered for the purpose of encouraging employees to vote for Respondent is well within the reasonable limits of campaign propaganda.

I therefore conclude that, when viewed in its entire context, no one could reasonably construe that this letter threatened, coerced, or intimidated employees or appealed to racial prejudice. Accordingly, I find no merit in Respondent's contention that such letter constitutes objectionable conduct on the part of the Union.

Respondent also contends that the assignment of Morrison and Rivera, a black and Hispanic respectively, to head the Union's organizing campaign coupled by the subsequent assignments of Kenney and Deary, white male organizers and Rebor, a white female organizer, was designed to promote racial divisiveness in the campaign. I find such contention totally preposterous and wholly without merit. The only significance of such assignment is that it tends to establish that the Union does not discriminate with regard to its hiring of union representatives.

Accordingly, I conclude that Respondent has failed entirely to establish that the Union has engaged in any objectionable conduct which would threaten, intimidate, or coerce employees or any conduct which would tend to or promote racial division, tension, and prejudice in connection with its organizing campaign. I therefore find all Respondent's contentions to this effect totally without support and merit and all Respondent's objections thereto.

F. *The Union's Alleged Misrepresentation Concerning the Cost-of-Living Increase*

Objection 6

Harold Morrison, union representative, credibly testified without contradiction that, during the course of the Union's campaign, at union meetings held throughout the course of the campaign, he informed employees attending such meetings that the Union had negotiated collective-bargaining agreements with other employers which contained cost-of-living protection clauses. During a union meeting held on April 7, Local union representatives from White Westinghouse, a union shop in the area, enumerated various benefits provided for in their collective-bargaining agreement. Among the benefits enumerated was their cost-of-living provision. The details of such provision or of similar provisions contained in other collective-bargaining agreements were not discussed at this or any other union meeting. According to Morrison's credible testimony, employees present at these meetings did not question union representatives concerning the details of the cost-of-living protective clauses provided by the Union in other collective-bargaining agreements. Moreover, during the course of these meetings such cost-of-living provisions were only one of many union benefits enumerated. According to Morrison's testimony, a total of over 70 different Respondent employees were present during the course of these six or seven union meetings where the cost-of-living protective clauses were discussed.

A union leaflet issued on April 11, 1979, consisting of two pages supports Morrison's testimony. The leaflet in a paragraph entitled "Cost of Living Out of Sight" sets forth as follows:

> The U.S. Department of Labor announced last month that the cost of living is rising at a yearly rate of over 15%. If this keeps up, the Vitek employees who can't make ends meet will now go further in the hole.
>
> More than ever, *Vitek employees need a union to negotiate substantial wage increases and cost of living protection*, now. That is why the overwhelming majority of Vitek employees have signed up with the IUE. [Emphasis added.]

On June 4, the Union distributed the leaflet, which is alleged to constitute the Union's misrepresentation concerning the cost-of-living increase.

> GASOLINE PRICES UP 35%
> FOOD PRICES UP 15%
> EVERYTHING'S UP
> YET THE COMPANY PROVIDES
> NO COST OF LIVING
> PROTECTION AT VITEK
>
> Every day in every way, the money we make at Vitek buys less and less. Latest figures issued by government indicate that the cost of living is going up at a rate of 14% yet the Vitek Company provides no cost of living protection for its workers, another reason why we need a union at Vitek.
>
> In other plants in this area, where the people have previously voted-in the IUE, the union has negotiated cost of living protective clauses.
>
> Under their union contract
>
> * AT EDISON PRODUCTS (WHITE-WESTINGHOUSE), EDISON, N.J.
> * AT GULTON INDUSTRIES, METUCHEN, N.J.
> * AT DELCO BATTERY, NEW BRUNSWICK, N.J.
>
> the wages of IUE members are increased regularly, throughout the year, to keep pace with the cost of

living increase announced by the U.S. Department of Labor.

This is the kind of protection we need at Vitek where wages are low enough without being further "cut" by runaway prices.

VOTE YES FOR IUE — IT PAYS TO BELONG

Yes	No
----	----
----	----

FLASH

A federal court has just upheld the IUE-AFL-CIO lawsuit charging that President Carter's 7% wage controls are illegal.

This is an important step forward in the union's fight to see that workers at plants such as Vitek are not held down at this time when the cost of living is going up at a rate of 14%.

IUE has performed a service, not just for its own members, but for workers throughout the country, by fighting against wage controls. It shows the strength of our union and our concern for the needs of working people.

Morrison testified that, following the distribution of this leaflet, no employee approached him with questions concerning the leaflet.

Respondent contends that the phrase contained near the end of that leaflet, "to keep pace with the cost of living increase," constitutes a material misrepresentation. Respondent's contention is that the phrase, "to keep pace with," implied to employees that the Union's cost-of-living protection clause would equal, to the penny, the actual rise in the cost of living as reflected by the Consumer Price Index. Respondent further contended that when the cost-of-living increase provisions provided for in the Edison, Gulton, and Delco contracts were calculated and compared with the actual cost of living reflected by the Consumer Price Indexes during the period of these collective-bargaining agreements up and until June 7, such cost-of-living protection provided for in such agreements substantially failed to equal the actual cost of living. To substantiate this contention, Respondent called Donald Reilly as an expert witness. Reilly is employed by ACT Industries, and has had at least 12 years' extensive accounting and collective-bargaining experience. There is no question but that Reilly is an expert in the area. Reilly obtained copies of the Edison, Gulton, and Delco collective-bargaining agreements described in the above union leaflet and made certain calculations, described below, using the cost-of-living provisions provided in the respective collective-bargaining agreements and the lastest available data from the National Consumer Price Indexes, as a basis for his calculations.

In Reilly's calculations he initially took for the Edison, Gulton, & Delco agreements the lowest wage rate provided for in each agreement and calculated the total cents per hour lost to inflation as determined by the Consumer Price Index. His initial calculation did not take into account the across-the-board wage increases (ACB) provided for in the collective-bargaining agreements. He thereafter made a second calculation where he included the across-the-board wage increase (ACB) provided for in the respective collective-bargaining agreements. Similar cost-of-living calculations were made by Reilly using the highest wage rate provided in the respective agreements as well as a wage rate which was closest to the numerical average wage rate provided for in the respective agreements.[18] In all his calculations made on behalf of Respondent, Reilly made an assumption that the initial across-the-board increase (ACB) provided for in the respective collective-bargaining agreements was intended to make up for the third year of the prior agreements, i.e. the 1973-1976 agreements. Reilly admitted that he did not know whether the prior 1973-1976 agreements for the above three companies provided for across-the-board increases during the last year of the agreement or when such increases were provided. Reilly further admitted that he did not know whether the parties to these agreements intended that the initial across-the-board increase was to provide for expected cost-of-living increases during the first year of the new agreement or to make up for past cost-of-living increases occurring during the prior agreement.

Reilly readily conceded that another competent expert with experience similar to his own, using the same collective-bargaining agreements and Consumer Price Indexes, could have reached different calculations by making different, but equally valid, assumptions.

The result of Reilly's calculations discussed above are set forth below. The first column of figures shows the total cents per hour lost to inflation *without* including ACBs from 1976 through June 1, 1979. The second column shows the total cents per hour lost to inflation including ACBs from 1976 through June 1, 1979:[19]

Edison Agreement		
Low wage	$.66	$.16
Average wage	.78	.28
High wage	1.28	.78
Gulton Agreement		
Low wage	$.60	.12
Average wage	.73	.25
High wage	1.03	.55
Delco Agreement		
Low wage	$.13	0
Average wage	.28	0
High wage	.56	0

On cross-examination, Reilly was asked by counsel for the Union to calculate, in the same manner, total cents per hour lost to inflation but with the assumption that the initial across-the-board increase provided for in the respective collective-bargaining agreements were to be

[18] The Edison collective-bargaining agreement in question commenced on September 1979, the Gulton agreement in August 1976, and the Delco agreement in November 1976.

[19] These calculations are based on Reilly's assumption that the initial across-the-board increases provided in the respective collective-bargaining agreements would be applied to make up cost-of-living increases incurred in the last year of the 1973-1976 agreements and that the ACBs provided for at the beginning of the second year of the 1976-1979 agreement would be applied to the initial year of the agreements and that the third ACB would be applied to the second year of the agreements.

applied to the first year of the agreement, the second across-the-board increase to be applied for the second year of the contract, and the third across-the-board increase to be applied for the third year of the contract. Making such calculations using this assumption, Reilly reached the following results for the 1976–1979 contract period set forth below showing the cents per hour lost to inflation with ACB as described above:

Edison Agreement	
Low wage	0
Average wage	0
High wage	.14
Gulton Agreement	
Low wage	0
Average wage	0
High wage	.21

Delco Agreement—all employee wages exceeded Consumer Price Index (CPI)

In connection with Respondent's contention that the cost-of-living calculations should be computed without including ACBs, Reilly admitted on cross-examination that he was not aware of any contract within his experience which provided for no across-the-board wage increases but rather only for a cost-of-living adjustment increases (COLA). Reilly further admitted on cross-examination that, throughout his experience in negotiating collective-bargaining agreements, across-the-board wage increases and COLA increases comprised the total cost-of-living protection provided for in a particular collective-bargaining agreement.

Michael Giuliano, an International union representative, who has negotiated collective-bargaining agreements on behalf of the Union for the past 4 years, testified that, throughout negotiations in which he had participated on behalf of the Union, across-the-board wage increases and COLA increases were integrally related. In this connection, Giuliano testified as did Reilly that he knew of no collective-bargaining agreement which provided for across-the-board wage increases, but rather only COLA increases.

Giuliano further testified that selecting a low, average, and high rate of pay as Reilly did, without taking into account the number of employees earning such pay rates, is an inaccurate and unreliable manner of calculating cost-of-living increase comparisons. This is because the overwhelming majority of employees in any particular company tend to be in the low wage classifications; experience establishes that there are very few employees in the high wage classifications. Giuliano testified in this connection that the significant figure is the wage rate earned by the mean average employee, which is obtained by multiplying the number of employees by their particular rate of pay, adding up the total, and dividing this total by the number of employees.

To apply a hypothetical application to Giuliano's reasoning we could assume a plant of 100 employees with a low rate of $4 an hour, an average rate of $6 an hour, and a high rate of $8 an hour. Assume hypothetically that 100 out of the 100 employees are earning the low rate, it becomes readily apparent that Reilly's calculations as to the average and high wage rates are totally meaningless.

Taking the Gulton plant as an example, and comparing Reilly's calculations concerning the Gulton collective-bargaining agreement with Giuliano's reasoning, it becomes obvious that Reilly's calculations are meaningless. In the Gulton contract, Reilly had selected a low wage rate during the first year of such contract as being $4.21 per hour, the average rate being $4.79 per hour, and the high rate as $6.08 per hour. In fact, Gulton employs 94 employees. The overwhelming majority of these employees are in the lowest wage rate. Applying Giuliano's mean average formula, the mean average hourly rate of all Gulton employees was calculated to be 4.205 cents per hour. It thus can be seen in connection with the Gulton contract, as with the hypothetical situation described above, that applying Giuliano's logical reasoning, which takes into account the actual number of employees and their actual pay rate, Reilly's calculations as to the average and high rates would be totally inapplicable.

The applicable Board law as to misrepresentations provides that the objecting party carries the "heavy burden" of proving that there has been "Prejudicial unfairness in the election." *NLRB v. Claxton Poultry Co.*, 581 F.2d 1133, 1135 (5th Cir. 1978). This heavy burden (*NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)):

> . . . is not met by proof of mere misrepresentations or physical threats. Rather, specific evidence is required, showing not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.

With respect to the alleged misrepresentations, Respondent must do substantially more than prove that the opposing party has made a misrepresentation in order to establish objectionable conduct sufficient to require an election be set aside. As the Board stated in *Hollywood Ceramics Co.*, 140 NLRB 221, 224 (1962), the leading case on misrepresentations:

> We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if

> it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a *de minimis* effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion. Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.

See also *General Knit of California*, 239 NLRB 619, 620 (1978), where the Board overruled the standard of review adopted in *Shopping Kart Food Market*, 228 NLRB 1311 (1977), and expressly returned to the standards articulated in *Hollywood Ceramics*.

In other cases, the Board and the courts have elaborated on this standard, and under these decisions an election will be set aside only where the following conditions are met:

1. The statement must be a misrepresentation.

2. The statement must be a *substantial* departure from the truth. Thus, the Board will not set aside an election as a result of the kind of rhetorical or exaggerated statements that are typical of any campaign. See, e.g., *Russell-Newman Mfg. Co.*, 158 NLRB 1260, 1264 (1966) (Board will not set aside election where message conveyed in election propaganda is merely "inartistically or vaguely worded and subject to different interpretations"; union literature found to be "at worst . . . an exaggeration of fact, subject to different interpretations"); and *NLRB v. Sauk Valley Mfg., Co.*, 486 F.2d 1127, 1131 (9th Cir. 1973) ("a certain degree of inaccuracy and ambiguity" is the norm in election propaganda, inasmuch as "prattle rather than precision is the dominating characteristic of election publicity").

3. The statement must be made sufficiently close to the election so that the other party does not have time to make an effective reply. Generally, elections will be set aside only where a statement was made just a day or two before the election. See, e.g., *Kalvar Corp.*, 204 NLRB 805 (1973), and *Beaird-Poulan Division*, 247 NLRB 1365 (1980), affd. 649 F.2d 589 (8th Cir. 1981) (company was able to respond adequately to union's statements about its contract with another employer, even though union's untrue statements were made less than 24 hours before the polls opened). Even if a misrepresentation is made in the final days of the campaign, the election will not be set aside if the subject of the misrepresentation had been raised earlier in the campaign. See, e.g., *Elmcrest Convalescent Hospital*, 173 NLRB 38 (1968). Finally, in order to reply effectively, it is not necessary that a party be able to refute each element of the misrepresentation in detail. See *Lipman Motors v. NLRB*, 451 F.2d 823, 826 fn. 6 (2d Cir. 1971). ("The Company argues in its brief that there was insufficient time to reply because '[t]he pension plan involved the laundry worker's Union and existed, if at all, in an industry totally unrelated to that of the Employer here.' But it was necessary for the Company to confirm all the details of the Union's plan before it replied.")

4. The misrepresentation must be one which would be reasonably expected to have an effect on the election. Generally an election will not be set aside unless "the employees would tend to give particular weight to the misrepresentation because it came from a party that . . . was in an authoritative position to know the true facts," *Gypsum Co.*, 130 NLRB 901, 905 (1961), *or* the employees would *believe* the speaker had "special knowledge." *NLRB v. A. G. Pollard Co.*, 393 F.2d 239, 242 (1st Cir. 1968).

Conversely, an election will not be set aside where the employees possess independent knowledge with which to evaluate the misstatement. See, e.g., *NLRB v. S. Prawer & Co.*, 584 F.2d 1099, 1102 (1st Cir. 1978) (employer's objection to alleged misrepresentation by union of the circumstances behind an employee's discharge overruled because "even had the Union misrepresented the situation, this was an instance where the employees would have no reason to believe the Union's information was any more accurate than their own and that the employees could accordingly assess any such union representation"); *U.S. Gypsum*, supra, 130 NLRB at 904 ("[W]hen one of the parties deliberately misstates material facts which are within its special knowledge, under such circumstances that the other party or parties cannot learn about them in time to point out the misstatements, and *the employees themselves lack the independent knowledge* to make possible a proper evaluation of the misstatements, the Board will find that the bounds of legitimate campaign propaganda have been exceeded and will set aside an election." Emphasis added.) *NLRB v. O. S. Walker Co.*, 469 F.2d 813, 817 (1st Cir. 1972), and *El Monte Tool & Die Casting v. NLRB*, 633 F.2d 160, 163 (9th Cir. 1980).

Respondent contends that the leaflet distributed by the Union on June 4, 1979, which provides that the Union has negotiated cost-of-living protective clauses at Gulton, Edison, and Delco, wherein the wages of its members are increased regularly throughout the year, "to keep pace with the cost of living increase announced by the U.S. Department of Labor," constitutes a material misrepresentation. Respondent specifically contends that the phrase therein, "to keep pace with" implied to employees that the Union's cost-of-living protection clauses in these agreements keep pace exactly equal to the cost of living set forth in the Consumer Price Indexes.

The initial question that must be considered is whether the leaflet contains a misrepresentation. In order for Respondent to prevail, it has the heavy burden of establishing the statement was a misrepresentation. *NLRB v. Claxton Poultry Co.*, supra; *NLRB v. Golden Age Beverage Co.*; *Hollywood Ceramics Co.*, supra. In order to meet this burden Respondent must establish (a) that the phrase, "to keep pace with the cost of living increase" reasonably implied in the minds of employees that the cost-of-living protection clauses contained in the Gulton, Edison, and Delco agreements provided for cost-of-living increases exactly equal to the Consumer Price Index and (b) that such cost-of-living protective clauses contained in these

agreements substantially fail to provide cost-of-living increases exactly equal to the Consumer Price Index.

I conclude for the reasons set forth below that Respondent has utterly and completely failed to meet this burden.

The first issue presented is whether the phrase, "to keep pace with," contained in the Union's June 4 leaflet distributed to employees reasonably implies cost-of-living increases exactly equal to the Consumer Price Index. To establish this, the union campaign with respect to this issue must be examined in its entirety. In this connection, the evidence established that cost-of-living protective clauses were frequently discussed by the Union through its representatives at various (6 or 7) union meetings attended by over 70 employees. During these meetings, the employees were informed generally, by different union representatives, that the Union provided cost-of-living protective clauses for various companies with whom they had collective-bargaining agreements. There is no evidence that during such meetings employees were informed that these cost-of-living protective clauses provided cost-of-living protection equal to the Consumer Price Index. When cost-of-living provisions were discussed, the employees raised no questions as to the details provided in the Union's cost-of-living protective clauses. Moreover, in union literature distributed to the employees on April 11, the Union as in their meetings merely noted that Respondent's employees needed a "Union to negotiate substantial wage increases and cost of living protection." This leaflet did not in any way suggest that such cost-of-living protection clause should equal the Consumer Price Index.

Further, an examination of the June 4 leaflet itself fails to establish that the Union was even attempting to convey to employees the impression that their cost-of-living protective clauses kept pace, whatever that phrase means, with inflation. In this connection the bold, handprinted lettering at the top of the leaflet provides:

GASOLINE PRICES UP 35%
FOOD PRICES UP 15%
EVERYTHING'S UP . . .
YET THE COMPANY PROVIDES
NO COST OF LIVING
PROTECTION AT VITEK

The first paragraph of the leaflet sets forth in a typewriter size print that the wage provided by Respondent provided for increasingly less purchasing power. The second paragraph of the leaflet sets forth that at other plants represented by the Union, the Union has negotiated cost-of-living protective clauses. It is only in the third paragraph, near the end of the entire leaflet, in an innocuous location, that the Union sets forth that the cost-of-living clause in the Gulton, Delco, and Edison agreements are designed "to keep pace with the cost of living increase announced by the U.S. Department of Labor." I therefore conclude that an examination of the entire leaflet reasonably suggests that the object of the leaflet was not to convey to employees that the Union negotiated cost-of-living protective clauses which equaled the Consumer Price Index but, rather, that in view of increasing prices, cost-of-living protection was important and that the Union had negotiated cost-of-living protective clauses in other collective-bargaining agreements.

Moreover, I conclude, for the same reasons set forth in the paragraph above, that no employee reading this leaflet would interpret it in the manner contended by Respondent.

As set forth above, the objecting party carries the "heavy burden" of proving the misrepresentation. *NLRB v. Claxton Poultry Co.*, supra. Moreover, the Board will not set aside an election because a message conveyed in a campaign leaflet is "inartistically or vaguely worded and subject to different interpretations." *Russell-Newman Mfg. Co.*, supra; *Sauk Valley Mfg. Co.*, supra. At the very least the objected-to language is ambiguous and subject to different interpretations. Yet, Respondent, contrary to the broad remand by the Third Circuit, and despite the substantial number of witnesses called by Respondent during this lengthy hearing, failed to introduce a single employee witness to testify as to his interpretation of the leaflet, or any other evidence to establish how the leaflet was interpreted by the employees.[20]

Assuming the Union's statements in its June 4 leaflet were construed or Respondent contends, the Board has allowed considerable latitude in such campaign propaganda. In *Ralvar Corp.*, 204 NLRB 805 (1973), the Board held that a union handbill which stated that it provided hospitalization insurance which provided that "room and board are paid in full regardless of rate" was not a material misrepresentation although such benefit was limited in the case of private room accommodations to the average semiprivate room rate for the hospital. The Board,

[20] It would appear that the Third Circuit remand provided that Respondent should be allowed to introduce testimony by employees as to their interpretation of the union leaflet. In this connection, the remand, 653 F.2d 785, 793 (1981), provided:

> We similarly reject the RD's resolution of the COLA issue on the ground that it involved no "substantial departure from the truth." In concluding that the Union's "news" handbills were subject to "varying interpretations," the RD drew his ultimate distinction between truth and falsity by resort to a specious semantic distinction. As a result, we do not believe that he could properly determine on the basis of his investigation that, as a factual matter, the audience to which it was addressed would adopt an interpretation other than Vitek's [Respondent]. In view of the significance of the alleged discrepancy and our own skepticism that the item would be interpreted as other than a misrepresentation, we conclude that the RD should not have reached his decision without first affording Vitek [Respondent] a hearing in which to challenge the RD's assumption that the handbill would be interpreted by its intended audience consistently with the truth of the underlying facts.

The court also stated at 791:

> For purposes of determining whether a genuine issue of fact existed as to the accuracy of the statement [a reference to the "keep pace with the cost of living increase" issue], we have difficulty, to say the least, appreciating this subtle distinction. We think such subtlety would be even less appreciated by employees in the heat of an election campaign.

That the remand provided such latitude is confirmed by the Third Circuit's recent decision, *Jamesway Corp. v. NLRB*, 676 F.2d 63 (1982), where the court stated at 72-73:

> In other cases, remand has been necessary because the nature of the misleading statements made it unclear whether they had affected the election. Thus in *Vitek Electronics v. NLRB*, 653 F.2d 785 (3d Cir. 1981), we remanded to the Board because the alleged misrepresentations were ambiguous and may not have been misunderstood by employees.

holding that such handbill was not a misrepresentation within the meaning of *Hollywood Ceramics*, supra, held that, in view of the general practice in group hospitalization insurance plans to limit full coverage for hospital room and board expenses to semiprivate accommodations, it doubted that employees reading the union handbill would unquestioningly have accepted it as applicable to private hospital room accommodations. I conclude the same rationale is applicable to the instant case. Reilly, Respondent's expert in the area, admitted he was unaware of any cost-of-living protective clause which was capped to the level of the Consumer Price Index. Further, Respondent failed to establish the existence of a single collective-bargaining agreement wherein cost-of-living protectives were so capped.

In other cases the Board has allowed a similar latitude. In *Southern Foods*, 171 NLRB 999, 1000 (1968), the Board stated:

> We do not deem as critical the possibility that the Petitioner may have exaggerated the monetary value of the numerous fringe benefits which were part of the package offered by Armour. It is common knowledge that in publicizing consummated collective-bargaining agreements, not infrequently employers and union place different monetary values on the negotiated modifications in wages and benefits (such as pregnancy leave, sick leave, and various insurance benefits), and in our view most employees are capable of evaluating such assertions.

See also *Follett Corp. v. NLRB*, 397 F.2d 91 (7th Cir. 1968) (7-cent overstatement of hourly rate held not a substantial misrepresentation); *Pepperell Mfg. Co. v. NLRB*, 403 F.2d 520 (5th Cir. 1969) (overstatements of hourly wage by 20 to 30 cents held not substantial); *Louis-Allis Co. v. NLRB*, 463 F.2d 512, 519 (7th Cir. 1972); *Steelworkers v. NLRB*, 496 F.2d 1342, 1346 (5th Cir. 1974) (overstatement of hourly wage by 2.8 cents held "insubstantial"); and *Standard Register Co. v. NLRB*, 649 F.2d 412 (6th Cir. 1981). Compare *NLRB v. Millard Metal Service Center*, 472 F.2d 647, 650 (lst Cir. 1973) (overstatement of hourly wage by 42 cents held not substantial); *Arvin Systems v. NLRB*, 570 F.2d 156 (6th Cir. 1978) (40 percent overstatement of hourly wage by 42 percent held not in substantial); *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 763 (8th Cir. 1980) (misrepresentation that a contract provided for increases of 12 cents per hour quartely, rather than annually, held substantial).

Secondly, Respondent has utterly failed to establish that the cost-of-living protective clauses in the Goulton, Delco, and Edison agreements do not exactly keep up with the Consumer Price Index. Respondent's expert witness Reilly readily conceded that a similarly qualified expert using the same contracts and CPIs could have reached entirely different calculations by making different assumptions. Reilly's calculations were based on an assumption that is not necessarily true. In this connection, Reilly's calculations were based on the assumption that the across-the-board increases provided for in all three agreements were designed to make up for cost-of-living increases which occurred during the third year of the prior 1973–1976 agreements, rather than to provide for expected cost-of-living increases to take place during 1976–1977, the first year of the agreements in issue. Reilly admitted that he had no knowledge as to whether the parties to these agreements intended the initial wage increase to make up for the prior cost-of-living increases in 1975–1976 or expected cost-of-living increases to take place during the initial year of the agreement. When asked to calculate the cost-of-living increases, assuming that such across-the-board wage increases were to cover expected cost-of-living increases during the 1976–1979 period, Reilly's figures indicated no cents per hour lost to inflation as to the low and average wage earner at the Edison and Gulton locations with a loss of 14 cents and 21 cents per hour loss respectively as to the high wage earners at Edison and Gulton for this period. As to the Delco agreement, Reilly's calculations indicated no money was lost to inflation during the 1976–1979 period under either assumption.

I reject as totally frivolous Respondent's contention that the cost-of-living increases provided by the Union's collective-bargaining agreements should be measured without a consideration of the across-the-board wage increases provided for in such collective-bargaining agreements. In this connection, Respondent's own expert Reilly concedes that he knows of no collective-bargaining agreements which provide for across-the-board wage increase, but rather a cost-of-living increase only. Further, throughout Reilly's cross-examination he readily admitted that across-the-board wage increases and cost-of-living increases comprise what is commonly called the cost-of-living protection provided for in collective-bargaining agreements. This principle is corroborated by the Union's expert, Michael Giuliano. Further, an examination of the June 4 union leaflet in question provides that "Under their Union contract [a reference to Edison, Gulton, and Delco] the wages of IUE members are increased regularly throughout the year to keep pace with the cost of living increases." The leaflet does not provide under the cost-of-living clause that the wages of IUE members are increases regularly throughout the year to keep pace with the cost-of-living increase.

However, I further find Reilly's calculations meaningless, and I am unable to support Respondent's contentions whichever assumption is used because they are not predicated on the total number of employees covered and the actual wage rates earned by such employees. In this connection, Reilly arbitrarily selected the lowest wage, the highest wage, and a middle wage provided for in the three agreements, without respect to the number of employees if any actually earned such wages. As set forth above, Guiliano's credible and unrebutted testimony established that the overwhelming majority of employees in any given plant generally are among the low wage earners, and that there are very few average, and even less high wage earners. The truthfulness of this testimony if confirmed by the Gulton records which establish that the mean hourly wage of all 94 Gulton employees in slightly less than the low wage rate chosen by Reilly. Therefore, unless we know the number of employees employed at a plant and the wages earned by

them, we really are unable to make any sensible calculation as to how they are affected by the cost-of-living provisions of the above contracts. The hypothetical example set forth above wherein no employees are in the middle and high wage category establishes the inapplicability of Reilly's calculations. Moreover, such hypothetical example becomes a reality when applied to the Gulton employees.

Therefore I conclude that Respondent's calculations are insufficient to establish any misrepresentation by the Union concerning the cost-of-living protective clauses in the Gulton, Delco, and Edison agreements.

Accordingly, I conclude that Respondent has failed to establish that the Union's June 4 leaflet could reasonably be interpreted to imply that cost-of-living protective clauses provided for in the Union's Gulton, Delco, and Edison agreements are exactly equal to the Consumer Price Index. I further conclude that Respondent has not established that the cost-of-living protective provisions provided by these agreements does not provide cost-of-living protection exactly equal to the Consumer Price Index. I therefore overrule Respondent's Objection 6 entirely.

G. *Alleged Misrepresentations In the Union's "Story Leaflet"*

Objection 4

On the morning of June 6, Harold Morrison and other union representatives distributed the so-called Story Leaflet. Respondent contends that chapter one of this leaflet contains various material misrepresentations. Chapter one sets forth as follows:

> BACK IN THE "GOOD OLE" DAYS
>
> In the "good ole" days, before the union came on the scene, the company had every opportunity to make Vitek a decent place to work.
>
> But they goofed. Rates of pay were the lowest in the area. Seniority meant nothing when it came to promotions or overtime.
>
> Few safety precautions were taken to protect the people from carbon monoxide fumes, and when they got sick because of the fumes, many of the workers lost pay.
>
> Employees could be fired with no chance of appeal and all in all, management was completely in the driver's seat.

Respondent specifically contends that the leaflet contains misrepresentations as to Respondent's policy concerning discharge, promotions, and assignment of overtime; that the leaflet contains misrepresentations as to safety precautions taken by Respondent and sick pay, and a misrepresentation that Respondent paid its employees the lowest rates in the area.

The credible and uncontradicted testimony of Morrison established that the leaflet reflected complaints made to the Union by Respondent's employees. Morrison testified that, throughout the union campaign, employees frequently complained to him and other union representatives about their low wages, that they could be discharged without recourse, and that seniority did not appear to be a factor in connection with promotions or the assignment of overtime. In addition, the employees also complained that Respondent failed to take proper safety precautions to protect them from carbon monoxide poisoning caused by Respondent's heating system and that, when employees became sick as a result and were not able to work, Respondent did not pay them for this lost time. These complaints were made by employees during union meetings and in casual conversations with union agents at Respondent's facility.

With respect to the employees' complaints concerning Respondent's discharge policy, the Union distributed a prior leaflet to employees on May 21 which set forth:

> When the Vitek company makes a decision to reprimand, discipline or discharge a worker, that's it. There is no grievance procedures, no appeals and no right to go to court. The company's word is final and that's the end.

Respondent did not respond to this leaflet.

The admitted facts establish conclusively that discharge does indeed lie within the sole discretion of Respondent. In this connection, there is no employee representative or other representative to whom an employee discharged, or in any manner disciplined, can appeal. There are no employee committees designated for this purpose, nor does any labor organization represent the employees. Further, there is no independent third party arbitrator designated by Respondent to whom an aggrieved employee can appeal.

Robert Giessler, president of Respondent, admits that discharge lies solely within the discretion of Respondent. Giessler maintains that there was nothing to prevent any employee discharged or disciplined from contacting him directly to appeal such discharge or discipline. However, Giessler admitted on cross-examination that, prior to the union campaign, Respondent never informed employees that they had a right to appeal a discharge or discipline to Giessler or their supervisor.

I therefore conclude that the statement in the Story Leaflet, the "employees could be fired with no chance of appeal and all in all, management was completely in the drivers' seat," is a completely accurate statement, and not a misrepresentation. Moreover, the evidence establishes that their complaints emanated from Respondent's employees. Therefore the alleged misrepresentation was not "within the special knowledge of the campaigner" but rather within the knowledge of the employees who could accordingly assess such union representation. *United States Gypsum Co.*, supra, 130 NLRB 901 (1961); *NLRB v. A. G. Pollard Co.*, supra, 393 F.2d 239 (1st Cir. 1968); *NLRB v. S. Prawer & Co.*, supra, 584 F.2d 1099 (1st Cir. 1978).

Additionally, the same complaint was made in a union leaflet distributed on May 21 and Respondent failed to respond although it certainly had more than adequate time to do so. *Elmcrest Convalescent Hospital*, supra, 173 NLRB 38 (1968).

Accordingly, I conclude, Respondent's objection to this aspect of the Story Leaflet is totally without merit.

With respect to the employees' complaints concerning seniority as it relates to the assignment of overtime, the testimony of Robert Giessler established that, prior to 1978, Respondent did not assign overtime. Beginning in 1978 overtime was assigned on a rotating basis. Assuming overtime was available on successive days, the necessary number of employees would be selected according to seniority to work overtime the first day. Overtime would thereafter be assigned by continuing down the seniority list. Selection in this manner would continue until all employees had been assigned overtime work. Thus, overtime was assigned to employees in this circular or rotating manner. Giessler conceded that under this system each employee, regardless of seniority, would, over a period of time, receive the same overtime as other less senior employees.

Based on Respondent's admissions, I conclude that seniority was not a real factor in the assignment of overtime. Were it so, the senior employees would continually receive first opportunity to work available overtime on each occasion that overtime was available.

I therefore conclude that the Union's statement in the Story Leaflet concerning the assignment of overtime was true and not a misrepresentation.

Moreover, the evidence established that these complaints emanated from Respondent's employees. Therefore the alleged misrepresentation was not "within the special knowledge of the campaigner" but rather within the knowledge of the employees who could accordingly assess such union representation. *United States Gypsum Co.*, supra; *NLRB v. A. G. Pollard Co.*, supra; *NLRB v. S. Prawer & Co.*, supra.

With respect to the employees' complaints concerning seniority as applied to promotions, the undisputed facts establish that, prior to the union campaign, Respondent did not inform employees either orally or in writing as to any policy concerning promotion. Indeed, promotions were not made by Respondnet until sometime during the beginning of 1978, by which time Respondent had grown substantially in size and employee complement. Earl Hartsel, Respondent's plant manager, testified that Respondent's policy prior to and throughout the union campaign was to promote employees based on their capability. Hartsel maintained that in this connection seniority was a factor. However, Hartsel could recall no promotion when the most capable employee was not selected regardless of his or her seniority. Nor could he recall a single instance where an employee having greater seniority, but less capability than another employee, was selected. In this connection, on April 2, 1979, employee Rosie Carr was promoted over Florence Davis although Carr had less seniority than Davis and six other employees. Hartsel testified that Carr was promoted because in the opinion of management she was the most capable employee. When Davis complained to Hartsel about being bypassed concerning his promotion, and pointed out to Hartsel that she had more seniority than Carr, Hartsel told her that seniority meant nothing.[21]

[21] Hartsel denies this statement to Davis. However, based on comparative demeanor considerations, I credit Davis.

Robert Giessler admited that shortly before and during the union campaign he received numerous employee complaints concerning Respondent's failure to consider seniority with respect to promotions. In response to these complaints, in April during the union campaign, Respondent posted in the plant, a "Job Posting Procedure" which provided in relevant part:

> 3. Selection (to a posted job position) will be made on the basis of qualifications: In the event of equally qualified applicants, seniority will be the deciding factor.

Giessler conceded that, consistent with this job posting procedure, seniority was not a factor in promotion, unless two or more employees were *exactly equal* in all other qualifications.[22]

Further, Respondent's records establish that, from the beginning of 1978 when Respondent commenced promotions until June 7, Respondent promoted a total of 15 employees; of these, 7 promotions were made out of seniority.

The facts above establish that the single factor considered by Respondent in determining which employee should be promoted was the capability of the employee. Seniority was not a factor. This is established by Hartsel's admission that he could recall no instance when the most capable employee was not selected regardless of seniority, and his further admission that he could recall no instance when an employee having more seniority but less capability than another employee was selected. It is further established by his admission to Davis that seniority was not a factor concerning promotions, and by Giessler's admission that, even following the job posting procedure described above, employees were promoted by selecting the most qualified employee and that seniority was not a factor *unless all other qualifications were exactly equal.*

I therefore conclude that the Union's representation that seniority meant nothing when it came to promotions was more than substantially accurate, and not a misrepresentation.

Moreover, the evidence establishes that these complaints emanated from Respondent's employees.[23] Therefore the alleged misrepresentation was not "within the special knowledge of the campaigner" but rather within the knowledge of the employees who could accordingly assess such union representation. *United States Gypsum Co.*, supra, 130 NLRB 901 (1961); *NLRB v. A. G. Pollard Co.*, supra; *NLRB v. S. Prawer & Co.*, supra, 584 F.2d 1099 (1st Cir. 1978).

With respect to the employees' complaints concerning safety conditions, the facts established that, sometime during the last week of January 1979, Respondent moved into its facility located in Edison, New Jersey, which had been built to Giessler's specifications by a building contractor.

[22] It could be argued that the posting of the above job posting procedure by Respondent in response to employee complaints during the Union's campaign was an unfair labor practice in violation of Sec. 8(a)(1).

[23] In this respect Giessler concedes that he initiated his job posting procedure pursuant to complaints of employees in April 1979.

On February 12, the first-shift employees complained of severe headaches and nausea. These symptoms became so severe that the employees were forced to leave Respondent's plant and were treated at a local hospital. The doctor who treated the employees diagnosed their condition as carbon monoxide poisoning and sent them home. It was subsequently ascertained that their illness was directly attributable to excess carbon monoxide in Respondent's plant caused by the heating system coupled with inadequate ventilation. As a result of their illness many employees required several days' recuperation at home. However, Respondent paid all employees only a half day's pay, regardless of the number of days they were absent due to such carbon monoxide poisoning. This payment was reflected in the employees' checks which issued on February 17.

Thereafter, employee Viesta Ware, who was out sick for a period of 5-1/4 days following the February 12 incident described above, filed a claim for workmen's compensation. On May 4, the workmen's compensation board issued a decision concluding that Ware was entitled to the additional compensation claimed. Accordingly, Ware was paid by the carrier, American Mutual for 5-1/4 days. On May 4 or May 5, following the workmen's compensation decision concerning Ware, Respondent paid those employees absent more than 1 half day as a result of the February 12 incident up to 2 additional days, depending on their total absence.[24]

Carmine D'Elio, Respondent's vice president of operations, testified that Respondent's payment to the above employees of the up to two additional sick days on May 4, the day of the Viesta Ware workmen's compensation decision, was merely a coincidence. But, in any event, payment of wages to which these employees were entitled was delayed for a period of at least 2-1/2 months. Moreover, such payments were without interest. Additionally, such payments did not take place until a time well into the union campaign.[25]

Immediately after Respondent ascertained that the illness of employees on February 12 described above was caused by excessive carbon monoxide gas in the plant area, it attempted to correct this problem by the installation of an additional vent system and a reduction of the exhaust speed. These operations were completed by February 16.

Nevertheless, a second incident involving carbon monoxide poisoning took place on February 16, 1979. In this connection, employees Mary Sheffield and Joyce Reid credibly testified that they and other employees complained of severe headaches and nausea to their supervisor, Ed Conquest, who told them there was too much carbon monoxide gas in the plant. He ordered all the employees on the second shift to assemble and wait in the cafeteria. Shortly afterward, a shift supervisor, Al Gruszka, informed the employees assembled in the cafeteria that they could go home this time and Respondent would pay, but that Respondent would not pay them the next time. A total of 30 employees were sent home that day. These employees had worked for 6 hours prior to being released by Respondent; they were paid for their full 8-hour shift.

Al Gruszka denied telling employees that Respondent would not pay them the next time they were ill as a result of excessive carbon monoxide in the plant. I do not credit his testimony for the reason set forth below.

I credit the testimony of Reid and Sheffield. Both employees demonstrated an excellent recollection of the facts to which they testified. Additionally, they were most responsive to questions put to them on direct and cross-examination. They generally impressed me throughout their testimony as forthright and truthful witnesses.

I do not credit Gruszka's testimony, which was extremely vague concerning the details surrounding this incident. In this connection he could not recall that employees were assembled in the cafeteria at the time he sent them home. Rather, he testified contrary to the testimony of other employees, including Respondent's rebuttal witness, that the employees were working in the production area and he went around and individually released them. Moreover, he testified that the employees were complaining about breathing problems which is contrary to the consistent testimony of other employees and Respondent's officials who testified to employee complaints concerning headaches and nausea.

Respondent introduced several employees as rebuttal witnesses to substantiate Gruszka's rather vague testimony surrounding the details of the February 16 incident. However, their memory as to this incident proved even more unreliable than Gruszka's.

Employee Lynn Daley initially could not recall whether Gruszka said anything to the employees concerning their receiving payment. Daley did testify, pursuant to leading questions, that Gruszka did not tell her that she would get paid this time but that if she left early again she would not be paid. Daley could not recall whether Gruszka spoke to employees individually and sent them home or whether they were assembled in a group.

Employee Cornelia DeBoles initially testified that she could not remember Gruszka stating anything to her or other employees concerning payment. However, pursuant to leading questions, she denied that Gruszka informed employees that they would not be paid the next time they left because of carbon monoxide related illnesses. DeBoles' recollection of the incident was so poor that she could not remember whether employees were assembled in the cafeteria.

[24] The following employees were paid by Respondent as set forth below:

Employee	*Days out*	*Days paid*
Florence Davis	2-1/2	2-1/2
Julia Green	1/2	1/2
Edward Rubas	1-1/2	1-1/2
Alice Ceccato	1-1/2	1-1/2
Delzora Mosely	5-1/2	2-1/2
Rubolph Newsome	1/2	1/2
Meung Jung	1/2	1/2
Frances Kelly	5-1/2	2-1/2
Vera Price	5-1/2	2-1/2

Employee Wiesta Ware was paid 5-1/2 days by American Mutual 5-1/2 days out.

[25] It could be argued that such payment by Respondent constituted an unfair labor practice in violation of Sec. 8(a)(1).

Employee Margret Pauser could not remember whether Gruszka said anything to the employees concerning payment for the day or anything about future company payments if employees had to leave the plant as the result of carbon monoxide poisoning.

Employee Jorge Chavez was similarly unable to recall whether Gruszka said anything to him or other employees about being paid for the day or future carbon monoxide related illnesses. Additionally, Chavez could not recall whether employees were assembled in the cafeteria at the time of their release. Although unable to recall such details, pursuant to leading questions he denied the statements attributed to Gruszka by Sheffield and Reid.

In view of the obvious poor recollection of facts surrounding the incident by Respondent's witnesses Daley, DeBoles, Pauser, and Chavez, and in view of the fact that any denial of the statement attributed to Gruszka by Sheffield and Reid resulted from leading questions put to them by Respondent, I do not credit their testimony.

A third carbon monoxide poisoning incident took place on February 26. At this time a number of employees on the second shift complained to their supervisors of severe headaches and nausea and left work 4-1/2 hours early. Respondent admits that seven employees made such complaints and left work.[26]

Employee Joyce Reid testified that, when she arrived at work on February 26, a number of employees were complaining of headaches and nausea. Respondent's supervisors opened the plant doors to let in fresh air. Reid testified that one of these open doors was located by her work station and that the rain outside was coming in on her. Reid testified that she left work because of the severe cold and rain which was striking her and that several other employees complaining of headaches and nausea also left.

Mary Sheffield testified that, when she reported to work on February 26, the doors were open but she could nevertheless smell the carbon monoxide fumes. Notwithstanding the open doors, she and other employees began to get severe headaches and nausea. Sheffield complained to her supervisor, Al Gruszka, that she felt sick from the fumes and had to go home. Gruszka told her she could go home and not come back. Sheffield replied that she did not think this was necessary but that she was leaving. She left the plant and punched her timecard.

Gruszka did not deny Sheffield's testimony above.

Timecards of Respondent established that, in addition to the 7 employees named by Respondent claiming to be ill and leaving on February 26, 14 additional employees left at the same time.[27] I conclude they left because of carbon monoxide poisoning.

Respondent admits that none of the above 21 employees were paid for their absence from work.

Robert Giessler testified that Respondent's policy concerning carbon monoxide related illness was that any employee who could substantiate by a doctor's note from Respondent's doctor or from the employee's personal doctor that their absence from work was due to carbon monoxide poisoning would be paid. However, such policy was never communicated either orally or in writing to the employees.[28]

Subsequently, Respondent added a second vent system in order to improve conditions and, on or about March 28, Respondent purchased and began using gas detection devices to measure the percentage of hazardous gases in the plant.

The facts establish that, beginning on February 12, employees began suffering from carbon monoxide poisoning which required them to leave work, and that such illnesses were caused by excessive carbon monoxide gas in the plant, which was the direct result of the failure by Respondent to provide proper ventilation. In short, proper safety precautions were not taken by Respondent to protect its employees from excessive carbon monoxide fumes.

The facts also establish that, on three separate occasions, large numbers of employees had to leave work because of excessive carbon monoxide fumes in the plant. The facts further establish that this condition was the direct result of Respondent's failure to provide proper ventilation. Respondent admits that the employees who left work on February 12 and 16 left because of carbon monoxide poisoning resulting from improper ventilation in the plant. The evidence also establishes, contrary to Respondent's contention, 20 employees had to leave on February 26 because of excessive carbon monoxide in the plant.[29]

Accordingly, I conclude that Respondent failed to provide proper safety precautions to protect its employees from carbon monoxide fumes and that, as a result of this failure, employees were forced on February 12, 16, and 26 to leave work because of carbon monoxide poisoning directly attributable to Respondent's failure to provide adequate ventilation.

I further conclude that, in many instances, employees were not paid for absence caused by this excessive carbon monoxide gas. In connection with the February 12 incident, the evidence established that Respondent initially made payment of only one-half day to those employees leaving work as a result of carbon monoxide poisoning. The remaining payment due, of up to 2 days, was not made until May 4, some 2-1/2 months later and only following a successful workmen's award in favor of employee Viesta Ware. I conclude that such a delay of payment, without interest, to unskilled employees who generally depend on their weekly paycheck for their daily needs is the substantial equivalent of a denial of payment. For this reason alone I would conclude that the statement in the Union's leaflet concerning lost pay by the

[26] Respondent's timecards establish that employees Diane Polidoro, Geraldine Person, Jerome Byrnes, Lynn Daley, Maria Dias, Valerie Dickey, and Elestine Randolf left work at 7:30 on February 26.

[27] Respondent's timecards establish that Mary Sheffield, Joyce Reid, Bessie Foots, Mary Gains, Shirley Esaw, Fannie Taylor, Ella Mae Fleming, Gregory Gittens, Veronica Hamlet, Samtab Sasinin, Sylvia Knight, Sherry Kelly, Marchelle James, and Fred Henderson left at 7:30 p.m. on February 26.

[28] Carmine D'Elio testified that, although he was aware of Respondent's substantiation requirements, he informed only those few employees who specifically asked him. Moreover, he admitted that no employee asked him prior to March 1. He did not specify which employees questioned him concerning Respondent's policy.

[29] Additionally, Joyce Reid left because of the cold and rain in the plant caused by Respondent's opening of plant doors to eliminate the excessive carbon monoxide.

workers due to carbon monoxide related illnesses was substantially true. However, the evidence also established that on February 16, Supervisor Gruszka informed 30 employees that they would not be paid for carbon monoxide related illnesses after February 16. Gruszka's statement of Respondent's position would appear to be accurate in view of the incident on February 27, when 20 employees were forced to leave work because of excess carbon monoxide in the plant and were not paid for such work-related illness. Respondent contends that its policy was to pay those employees who could substantiate their illness through a doctor's note. However, Respondent's policy was an extremely well-kept secret. The evidence establishes that employees were never informed either orally or in writing of such policy.

I therefore conclude that the statement in the Union's leaflet, that "few safety precautions were taken to protect the people from carbon monoxide fumes, and when they got sick because of the fumes, many of the workers lost pay," is substantially true and that no misrepresentation of fact existed. Accordingly, I find no merit in this aspect of Respondent's objection.

Moreover, the evidence establishes that these complaints emanated from Respondent's employees. Therefore the alleged misrepresentation was not "within the special knowledge of the campaigner" but rather within the knowledge of the employees who could accordingly assess such union representation. *United States Gypsum Co.*, 130 NLRB 901 (1961); *NLRB v. A. G. Pollard Co.*, 393 F.2d 239 (1st Cir. 1968); *NLRB v. S. Prawer & Co.*, supra, 584 F.2d 1099 (1st Cir. 1978).

Respondent also alleged that the Story Leaflet misrepresented Respondent's wage rates prior to the union campaign. In this connection the leaflet set forth:

> In the "good ole" days before the union came on the scene, the company had every opportunity to make Vitek a decent place to work.
>
> But they goofed. Rates of pay were the lowest in the area . . . .

The evidence establishes that, throughout the entire course of the Union's campaign, the subject of wage rates paid by Respondent as compared to other union shops were discussed, by both Respondent and the Union.

In this connection, Archer Cole, union district president, testified that, during a union meeting in April attended by approximately 50 employees, he told the employees that the Union represented a substantial number of companies in the area and that employees at such union shops were satisfied with wage and other working conditions in these plants. Cole specifically mentioned the large wage differentials that existed between Gulton, Delco, and Edison, all union plants, as compared, to Respondent. Similarly, Harold Morrison testified that at various union meetings he repeatedly emphasized to the employees the increased benefits which included higher wages that existed at union shops in the area.

The evidence established that the Union represented an enormous number of shops throughout the area. Cole testified that the Union represented almost 450 shops in the district which encompassed northern New Jersey, and represented a "whole slew" of union shops within the Respondent's immediate area.

Moreover, the wage issue was also discussed throughout the campaign through the literature distributed to the employees by both the Union and Respondent. In this connection, during the early part of April Respondent distributed a leaflet to its employees which set forth as follows:

> Vitek seeks to maintain wages and benefits which are in line with those paid for similar work in comparable companies in our area. Periodic surveys are conducted to insure that this practice is maintained on a current basis.
>
> A current survey has indicated that an increase in wages and benefits at this time would be appropriate. You can look forward to this adjustment during the month of April.

Following this leaflet, Respondent announced, in a subsequent leaflet distributed to all employees on April 17, a huge 17-percent wage increase. The leaflet set forth as follows:

> It is with great pleasure that I announce our 1979 wage adjustment. As we indicated in March, *we have been studying area wages and benefits for quite some time* to come up with the best possible package for you the employees, while at the same time servicing the interest of Vitek as a corporation.
>
> *As a result of our survey*, we have decided to have only a three step wage program rather than a multi step three year program used previously. Thus, a new employee coming in will receive a starting rate; after the 90 day probationary period the employee will receive a raise and then again at the end of 1 year. After this the employee can expect increases on an annual basis according to out annual survey of area wage rates. [Emphasis added.]

The Union, responding to Respondent's wage increases, distributed a leaflet on May 9 to employees setting forth as follows:

> The worth of the Union has already proved itself at Vitek. In the few short weeks since the people determined to sign up in the IUE, the Company has:
>
> Felt compelled to raise its extremely low wage scale . . . .
>
> Everyone knows the Company has taken these steps only because the Union is here and only because management knows that with a union they will have to do much more to improve wages and fringe benefits, without cost to the employees.

On May 31, Respondent distributed another leaflet to its employees which set forth as follows:

> Over the last couple of weeks, I have tried to give up the "real" story on Union membership. Many of you had said "Give me an example of what you are telling us."
>
> Well, In Morganville, New Jersey, near where Carmine [D'Elio] lives there is a Company called Entron, Inc. that does very similar work to Viteks. In fact they are in the cable TV business as well. The IUE came along and made some *very* familiar promises including *a raise of $2.00 an hour*! The majority of the Entron employees fell for their sales pitch, and voted the Union in. Well, the Union got them a raise all right: *35¢*! Entron has only one labor rate, not two like we have, and here's the comparison AFTER the Union settled the contract, and "deliver . . ."
>
> In other words we start new employees at 22¢ per hour more with the *IUE*, we pay 34¢ per hour *more* at 3 months, without the IUE, we end up paying 43¢ per hour *more without the IUE*. [Emphasis added.]

On June 5, Respondent distributed yet another leaflet to its employees which set forth as follows:

> QUESTION: If the Union were to win here, would our wage rates go down to the Entron ones you showed in your letter? [A reference to the Entron leaflet distributed by Respondent on May 31 described immediately above.]
>
> ANSWER: No that wasn't the purpose of what I was trying to say in that letter. [May 31 leaflet.] The real purpose of that letter was to show you that the Union didn't keep its promises to the Entron employees. The Union has made ridiculous promises hereto. But the truth is, all the Union can do is ask, it is the Company which pays your wages. We feel and hope you agree *that the recent wage increase was fair and equal to the rates paid by the companies in the area*. [Emphasis added.]

Thereafter, on June 6, in response to Respondent's June 5 leaflet, the Union distributed its Story Leaflet to the employees. Employee Mary Sheffield credibly testified that, following the distribution of the Story Leaflet, Carmine D'Elio, Respondent's vice president, assembled the employees in the work area and holding the Story Leaflet aloft in his hand, told the employees that he knew that Vitek was not the lowest paid Company in the area; that he could name five other companies who paid lower wages than Vitek. Sheffield testified that he did not name them. Sheffield responded that the employees realized that they were not the lowest paid, but they were not the highest paid either and she could name five companies that paid higher than Vitek. D'Elio asked her to name them. When she began to name such companies D'Elio told her to keep quiet. Sheffield testified that Respondent's usual practice following the distribution of union leaflets was to meet with employees to discuss the leaflet.

D'Elio admitted that he met frequently with the employees, approximately once a week throughout the union campaign. D'Elio further admitted that he recalled at least two occasions when he discussed wages with the employees—once when Respondent announced its wage increase on April 17 and another occasion when he discussed with the employees a comparison of wages at Vitek with that of several other union shops. During this discussion, he pointed out the difference in work involved between Vitek and these other union shops. D'Elio, although not specifically denying the June 6 meeting described above by Sheffield, testified that he could not remember holding such meeting. He did admit, however, that during meetings he conducted Mary Sheffield quite often spoke up.[30]

Based on my favorable impression with respect to Sheffield's credibility, described above, and in view of D'Elio's failure to specifically deny the meeting as described by Sheffield, I credit Sheffield's testimony.

As set forth above, the objecting party carries a heavy burden of proving that there has been prejudicial unfairness in the election. *NLRB v. Claxton Poultry Co.*, supra, 581 F.2d 1133 (5th Cir. 1978); *NLRB v. Golden Age Beverage Co.*, supra, 415 F.2d 26 (5th Cir. 1969). The objector must establish that such misrepresentation "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." Moreover, as set forth in *Hollywood Ceramics*, supra, 140 NLRB 221 (1962), even where a misrepresentation is established, the Board may still refuse to set aside the election if it finds on consideration of all the circumstances that the statement would not be likely to have had a real impact on the election.

Turning our attention to the facts of the instant case, the Story Leaflet described above refers to wage comparisons *prior to the advent of the Union's organizational campaign*. Subsequent to the union campaign, Respondent, on April 17, granted the employees a huge 17-percent wage increase so that on the day of the election their wages were substantially higher than they were prior to the advent of the Union, the period referred to by the union leaflet. Moreover, Respondent through its campaign, which included leaflets and speeches to employees, repeatedly informed them as to their *current wage comparability after their wage increase* with respect to union shops in the area. Under these circumstances it is difficult to imagine that a union leaflet comparing wage rates of the past could have any significant impact on employees on June 7, the date of the election. Moreover, despite the broad latitude of the Third Circuit remand, Respondent failed to produce a single witness or any other evidence as to how the employees interpreted the Story Leaflet.[31]

Therefore I conclude, for the reasons above, that Respondent's objection to his aspect of the Story Leaflet is without merit.

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[30] In rebuttal Respondent called employees Cornelia DeBoles and Rita Manella. However, both employees could recall only that D'Elio held a number of meetings with employees. They were unable to testify as to the specifics of any such meetings. Based on their total inability to recall any details as to any of the meetings conducted by D'Elio, I conclude that their testimony is totally unreliable.

[31] See fn. 20.

The Board has further held that, even if a misrepresentation is made in the final days of the campaign, the election will not be set aside if the subject of the misrepresentation had been raised earlier in the campaign. *Lemcrest Convalescent Hospital*, supra, 173 NLRB 38 (1968) *Allison-Haney, Inc.*, 185 NLRB 852 (1970); *Wells Fargo Security Guard Services*, 194 NLRB 828 (1972).

In *Allison-Haney, Inc.*, supra, the Board, in dismissing the Union's objections concerning the distribution to employees shortly before the election of a paycheck stub which set forth payroll deductions which the employer would be required to make for health and welfare benefits should the union win the election, concluded that the representation of such deduction by the employer, although perhaps erroneous, was an asnwer, in the course of the preelection campaign, to a number of circulars which the union had distributed and which described its policies with respect to health and welfare benefits to which the paycheck attachment was a reply. Under these circumstances, the Board concluded that the employees were therefore in a position to evaluate the claims of the respective statements.

In *Wells Fargo*, supra, 194 NLRB at 829, the Board, in overruling the union's objections concerning the employer's alleged misrepresentation as to wage rates, concluded:

> As we view the facts, the parties exchanged partisan campaign statements concerning the wage rates likely to result under collective bargaining should the Petitioner be certified, and the statements of both contained ambiguities and half-truths of the type which employees are capable of evaluating. In the circumstances, we conclude . . . that any inaccuracies in the Employer's July 6 letter did not have a significant impact on the election.

In the instant case, an analysis of the meetings conducted by the Union and by Respondent, and of the literature distributed to employees by both parties, established that the wage issue set forth in the Story Leaflet had been presented to the employees by both parties throughout the entire union campaign. In this connection, Respondent's early April leaflet sets forth that "Vitek seeks to maintain wage and benefits which are in line with those paid for similar work in comparable companies in our area." Its April 17 leaflet announcing the wage increase sets forth that "as a result of our survey we have decided to have only a three step wage program . . . after this the employee can expect increases on an annual basis according to our annual survey of area wage rates." Its May 31 "Entron" leaflet compares Respondent's wages with that of Entron, a union shop engaged in a comparable business to Respondent's. Its June 5 leaflet states, "We feel and hope you agree that the recent wage increase was fair and *equal to the rates paid by companies in the area.*" (Emphasis added.) Moreover, D'Elio met with employees immediately following the distribution of the Story Leaflet and he specifically discussed the alleged misstatement set forth therein. I therefore conclude that Respondent more than adequately presented the issue alleged as a misrepresentation so that employees were fully capable of making a fair evaluation.

For this additional reason, I would also find no merit to Respondent's objection in this respect.

I further conclude that the Union's statement, "rates of pay were the lowest in the area," refers to a comparison of Respondent's wages with that of other union shops in the area, rather than, as contended by Respondent, all companies in the area. An examination of the Union's entire campaign establishes this conclusion. Throughout the campaign, the Union attempted to compare the wages and other benefits obtained in union shops with those of Respondent. In this connection, the evidence established that in early April, during a union meeting attended by 50 Respondent employees, Archer Cole compared Respondent's wages with the wages obtained in other union shops. Further, at other union meetings, Morrison repeatedly compared wages obtained at other union shops in the area with those of Respondent. The evidence established that the Union represented a "whole slew" of shops in the area. It is obvious that the Union did not possess any knowledge as to what other nonunion shops in the area paid to their employees. Given the multitude of union shops in the area, given the favorable comparison which the Union was able to make, it is logical that the Union was comparing the wages of other union shops with those of Respondent. Again, I note that, despite the broad latitude of the Third Circuit remand, Respondent failed to produce a single witness or any other evidence as to how employees interpreted the Story Leaflet.[32]

Therefore, viewing the alleged wage misrepresentation set forth in the Union Story Leaflet as a comparison between Respondent and other union shops in the area, Respondent has failed to establish that *prior* to the advent of the union campaign it paid higher wages than *any union shops in the area.*[33]

I therefore conclude, additionally for this reason, that the Union's objection concerning this aspect of this Story Leaflet is wholly without merit.

Concerning Respondent's contention that the Story Leaflet referred to *all* companies in the area rather than union shops, the evidence established that Edison Packaging, located in Edison, New Jersey, paid its employees less than Respondent prior to April 1979. However, Edison Packaging is a warehousing operation rather than a manufacturing operation similar to Respondent. Respondent also established that Vera Imported Parts, located in Piscataway, New Jersey, paid its employees less than Respondent prior to April 1979. However, Vera, like Edison Packaging, is also a warehousing operation rather than a manufacturer. Respondent also established that Pressman Toy Corporation, located in New Brunswick, New Jersey, paid its employees wages lower than that of Respondent during the period prior to April

[32] See fn. 20.

[33] In this connection Respondent paid its employees less than Entron, a union shop in the area and comparable with Respondent prior to the union campaign. It was only *after* the union campaign was well underway in mid-April, following Respondent's 17-percent wage increase, that Respondent paid its employees more than Entron.

1979. Pressman Toy manufactures children's toys and is not in the electrical equipment industry. Respondent also established that Injectron Corporation, located in Plainfield, New Jersey, paid its employees less than Respondent employees during the period prior to April 1979. However, Injectron is not in the electrical equipment industry. Respondent also established that Standard Plastic Products and Mattel, a subsidiary of Standard Plastic Products, engaged in the manufacture, warehousing, and distribution of children's toys, paid their employees less than employees at Respondent for the period prior to April 1979. However, neither Standard Plastic Products nor Mattel is in the electrical equipment industry. Respondent also established that Blonder-Tongue Laboratories, Inc. located in Oakridge, New Jersey, engaged in the manufacturing of television signal reception products, paid wages which were generally lower than those of Respondent prior to April 1979.[34]

Herbert Beinstock, an eminent labor economist and former commissioner of labor statistics of the northeast region of the Bureau of Labor Statistics, was called as a witness by Respondent. Beinstock testified, after reviewing Bureau of Labor Statistics material, that in Middlesex County, where Respondent's facility is located, there were approximately 1032 manufacturing facilities as of 1978 encompassing a wide range of industries, and that immediately to the north of Edison, in the metropolitan Newark area, an area where many of Respondent's employees resided, there were at least several thousand more manufacturing facilities. Based on this testimony, I conclude that, in the area surrounding Respondent's Edison facility, there were at least 1000 to 2000 manufacturing facilities as of 1978 encompassing a wide range of industries.[35]

Therefore, at best, Respondent has successfully established that, out of 1000 to 2000 manufacturing facilities in the area, Respondent's starting wages are higher than 15 warehouse or manufacturing facilities, only two of which facilities are engaged in the electronic equipment industry. *Respondent adduced no evidence as to whether its wages were among the highest wage rates in the area* as compared to the total number of facilities in the area, let alone facilities comparable to Respondent. Under these circumstances, I conclude that Respondent has failed to establish that the alleged wage "misrepresentation" was a material misrepresentation *involving a substantial departure* from the truth sufficient to affect the results of an election.

As set forth above, the objecting party carries the "heavy burden" of establishing that the employees' exercise of free choice materially affected the results of the election as a result of the alleged misrepresentation. *NLRB v. Claxton Poutry Co.*, supra, 581 F.2d 1133 (5th Cir. 1978); *NLRB v. Golden Age Beverage Co.*, supra, 415 F.2d 26 (5th Cir. 1969). The Board will not set aside an election because of exaggerated statements that are typical of any election campaign. *Russell Newman Mfg. Co.*, supra, 158 NLRB 1260 (1966), nor will the Board set aside an election where the message conveyed in election propaganda is merely "inartistically or vaguely worded and subject to different interpretations" or "at words . . . an exaggeration of fact, subject to different interpretations." *NLRB v. Sauk Valley Mfg. Co.*, supra, 486 F.2d 1127 (9th Cir. 1973). In this connection, when Beinstock was questioned concerning the Union's alleged misrepresentation, set forth in the Story Leaflet, he testified as follows: "anyone who is knowledgeable in occupational wage analysis would regard that statement [referring to the Union's alleged wage misrepresentation] as being totally irrelevant. This is not the way you look at wage structures."

Accordingly, I conclude that the Union's Story Leaflet statement was not a material misrepresentation. I further conclude that even if the statement was not 100 percent accurate it was within the bounds of permissible election propaganda and did not constitute a substantial departure from the truth that could reasonably be expected to affect the conduct of an election. Accordingly, for these additional reasons, I conclude that there is no merit to Respondent's objection.

Moreover, if the alleged misrepresentation is to be interpreted as Respondent contends, then I would conclude that the Union would not possess "special knowledge" nor would the employees have reasonably believed that the Union was in an authoritative position to make representations as to thousands of nonunion shops. *NLRB v. A. G. Pollard Co.*, supra, 393 F.2d 239 (1st Cir. 1968); *United States Gypsum Co.*, supra, 130 NLRB 901 (1961). Again, I note that, despite the broad latituted of the Third Circuit's remand, Respondent failed to produce a single witness or any other evidence how the employees interpreted the Story Leaflet.[36]

Accordingly, for this additional reason I conclude there is no merit to Respondent's objection herein.

H. *Respondent's Affirmative Defenses*

Respondent alleges as its third affirmative defense that the hearing herein is an adequate remedy becase, inter alia, it is impossible to resurrect evidence concerning the atmosphere that existed during the relevant period immediately prior and up to June 17, 1979; there has been extensive turnover in the unit since that day; and evidence in support of Respondent's objections is otherwise unavailable to Respondent due to the passage of time.

In support of this position Respondent relied on two Second Circuit cases, *NLRB v. Hale Mfg. Co.*, 602 F.2d 244 (2d Cir. 1979), denying enf. of *Hale Mfg. Co.*, 236 NLRB 289 (1978), and *NLRB v. Nixon Gear*, 649 F.2d 906 (2d Cir. 1981). In *Hale*, supra, the Board set aside the Board's order certifying the election. The reason given by the court was that (602 F.2d at 249):

> Not only would it be almost impossible to resurrect evidence concerning the atmosphere that existed during the relevant period, but also the composition of the unit has no doubt shifted. In this case, the

[34] The preceding companies were the subject of the stipulation that they were representative of a total of 15 companies located in the area.

[35] Beinstock's testimony in this connection was based on 1978 Bureau of Labor Statistics figures.

[36] See fn. 20.

only way to assure "laboratory conditions" are restored is to hold a new election.

Similarly, in *Nixon Gear*, supra, 649 F.2d at 914, the Second Circuit refused to remand for hearing on the employer's objections noting that:

> The Union's victory was very narrow, the labor force . . . has undoubtedly changed since the election, and there is no way of knowing at this time if the Union enjoys a majority of support.

Respondent's reliance on these cards is misplaced in view of the Third Circuit's specific remand to the Board with instructions to hold the hearing herein. Had the Third Circuit considered a hearing in this matter to be an inadequate remedy, it would have so held.

Moreover, the two Second Circuit decisions conflict with decisions in other circuits, in which Respondent's argument was given careful consideration and rejected. In this connection, the Third Circuit recently noted in *Hedstrom Co. v. NLRB*, 629 F.2d 305, 312 (3d Cir. 1980 en banc), cert. denied 450 U.S. 996 (1981), enfg. a *Gissel* bargaining order 5-1/2 years after an employer's unfair labor practices had resulted in the erosion of majority support:

> [T]o require the Board to determine whether a continuing majority supports unionization would be "to put a premium upon continued litigation by the employer." . . . For an employer, particularly one with a rapid turnover rate, could hope that the resulting delay would produce a new factual situation which the Board would then have to consider. In the manner, the employer would be able to avoid any bargaining obligation indefinitely.

In connection with the hearing held herein, any contention by Respondent that it was impossible to resurrect evidence that existed during the preelection period because of the passage of time and turnover is wholly without merit. It is well settled that the burden is on the party who seeks to overturn an election to establish that objectionable conduct occurred which warrants such result. The ultimate responsibility for establishing this evidence is on Respondent.

Moreover, in reviewing the Regional Director's decision on objections and the Third Circuit's decision in this matter, I conclude that the evidence submitted to the Regional Director and the Third Circuit by Respondent in connection with its objections in this matter was fully presented and litigated at this hearing.

Accordingly, I reject Respondent's defense in its entirety.

Respondent alleges as a fourth defense that a bargaining order is inappropriate inasmuch as the Union no longer has a support of the majority of the employees in a bargaining unit due to, inter alia, the passage of time and extensive turnover in the unit since June 7, 1979.

For reasons set forth in *Hedstrom Co. v. NLRB*, supra, 629 F.2d 305, I reject Respondent's defense entirely. Additionally, in *Chromalloy Mining Division v. NLRB*, 620 F.2d 1120, 1132-33 (1980), the Fifth Circuit rejected employee turnover and the passage of time as a defense giving essentially the same reason as the Third Circuit in *Hedstrom Co.*, supra:

> If we required that a continuing majority support unionization, an employer with a rapid turnover rate could commit unfair labor practices freely, knowing that a substantial number of new employees would be working by the time the Board held a hearing and that the Board's only remedy would be to issue a cease and desist order and call a new election. The employer could then commit more unfair labor practices during the campaign, and the Board would have to hold a third election. The employer could thus avoid any bargaining obligation indefinitely, and the union would assume the role of Sisyphus, condemned in Hades continually to roll a stone up a hill, only to find that it slides down again before reaching the top.

Accord: *NLRB v. Dadco Fashions*, 632 F.2d 493 (5th Cir. 1980), *Ex-Cell-O Corp. v. NLRB*, 449 F.2d 1058, 1063 (D.C. Cir. 1971); *NLRB v. Frick Co.*, 423 F.2d 1327, 1334 fn. 17 (3d Cir. 1970).

Thus, it would appear that the Third and Fifth Circuits have accurately identified the considerations militating against judicial recognition of the passage of time and turnover of employees as reasons for denying a bargaining order. I find the rationale set forth in these decisions clearly applicable with equal force to the instant case. Accordingly, I reject Respondent's defense herein.

Respondent, in a fifth affirmative defense, contends that Respondent's objection to the election in Case 22-RC-7833 must be heard and finally determined in a representation proceeding prior to any unfair labor practice proceeding and that a hearing in the above representation proceedings cannot properly be combined with a hearing in an unfair labor practice proceeding in the instant case (Case 22-CA-9695).

The Board recently held in *Campbell Products Department*, 260 NLRB 1247 fn. 2 (1982), that a remand, similar to the remand in the instant case, does not act to reopen the underlying representation case. Rather, respondent must prove its objections to the underlying election in the C case proceeding submitted to the appropriate circuit court. Accordingly, Respondent's fifth affirmative defense is rejected.

I. *The Appropriate Evidentiary Standard*

As set forth and discussed below, Respondent alleged as its fifth defense that the remand required a reopening of the record in Case 22-RC-7833. Consistent with this affirmative defense, Respondent moved to reopen the representation proceeding accordingly. This motion was denied. Respondent thereafter requested special permission to appeal my ruling, which request was granted. Respondent's special appeal was denied by the Board on January 21, 1982. In connection with Respondent's motion herein, Respondent's attorney contended that the evidentiary standard to be applied during this hearing would be that applicable to representation proceedings,

rather than that applicable to unfair labor practice proceedings.

Section 10(b) of the Act requires that "so far as practicable" unfair labor practice proceedings "be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedures for the district courts of the United States." The Board has noted, citing the relevant legislative history of Section 10(b) of the Act, that the phrase "so far as practicable" provide the administrative law judge with "considerable discretion as to how closely he will apply the rules of evidence." *Alvin J. Bart & Co.*, 236 NLRB 242 (1978). The Board's Rules and Regulations, Section 102.66(a), provide that "the rules of evidence prevailing in courts of law or equity shall not be controlling" in representation proceedings. The practical difference between the evidentiary standards applicable in the two kinds of proceedings is nebulous. As set forth above the rules applicable to unfair labor practice proceedings provide considerable discretion as to how closely the administrative law judge will apply the rules of evidence.

At the outset of the hearing herein and on various occasions throughout the course of hearing, I ruled that I would conduct the instant proceeding "utilizing the Federal Rules and Civil Procedure as a guide, within [my] judicial discretion." In this connection I further ruled that I would be guided by the Federal Rules of Evidence "as far as practicable" with regard to my evidentiary rulings. Throughout the course of the hearing Respondent's counsel objected to my rulings particularly as they related to hearsay testimony. In each case I ruled that my evidentiary rulings would apply equally regardless of whether the instant proceedings were a representation case or an unfair labor practice case.

In the Union's brief, counsel for the Union requested that I make clear in my decision to what, if any, extent my evidentiary rulings would have been different in a representation proceeding. I have carefully examined the entire record herein and conclude that all of my rulings made in this case would have been exactly the same were this proceeding a representation proceeding.

Conclusions

I therefore conclude that Respondent's Objections 3 through 8, to the conduct of the election, are each utterly and entirely without merit. I further conclude that such objections were frivolous, and filed solely for purposes of avoiding Respondent's bargaining obligation. This case represents a case book example of that type of abuse of the Board's processes predicted by Board Member Penello in his dissent in *General Knit of California*, supra, 239 NLRB 619 (1978), wherein he observed that an employer determined to defeat the desires of its employees for collective representation need only file an objection alleging a misrepresentation and that by so doing, set into motion the Board's postelection machinery which from a Board election to a circuit court opinion takes approximately 2 years' time. This appears to be the timetable in the instant case.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent failed to establish the objectionable conduct set forth in Respondent's Objections 3 through 8 described above.

RECOMMENDATION

Upon the foregoing findings of fact, conclusions of law, and the entire record, pursuant to Section 10(c) of the Act, it is recommended that the Board's Order in *Vitek Electronics*, 249 NLRB 885 (1980), be affirmed.